Supreme Court, U.S.
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No.

In the Supreme Court of the United States

CROPLIFE AMERICA, *et al.*,

Petitioners,

v.

BAYKEEPER, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Since Congress enacted the Clean Water Act ("CWA") in 1972, the Environmental Protection Agency ("EPA") has never subjected the use of pesticides in, over, or near waters to permitting under the CWA's National Pollutant Discharge Elimination System ("NPDES") program. In 2006, EPA issued a Final Rule ratifying that settled practice and establishing that pesticides applied in accordance with the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") are exempt from the CWA's permitting requirements in two specific circumstances. Petitions challenging that Rule were filed in eleven different circuits and consolidated before the Sixth Circuit. The Sixth Circuit held that the CWA unambiguously foreclosed EPA's interpretation and invalidated the Final Rule. Its decision not only reverses more than 35 years of administrative practice, but mandates the greatest expansion of the NPDES program since the CWA was enacted. The questions presented are:

1. Did the Sixth Circuit erroneously conclude—in conflict with the decisions of this Court and other circuits—that the CWA unambiguously forecloses EPA's Rule?

2. Did the Sixth Circuit improperly substitute its judgment for that of the expert agency charged with administering the CWA?

3. Should the Court grant the petition, vacate the decision below, and remand for consideration in light of *Burlington Northern & Santa Fe Railway Co. v. United States*, 129 S. Ct. 1870 (2009)?

LIST OF PARTIES

1. Industry Petitioners/Intervenors were Agribusiness Association of Iowa, American Farm Bureau Federation, American Forest & Paper Association, BASF Corporation, Bayer CropScience, CropLife America, Delta Council, Eldon C. Stutsman, Inc., FMC Corporation, Illinois Fertilizer and Chemical Association, The National Cotton Council of America, Responsible Industry for a Sound Environment, Southern Crop Production Association, and Syngenta Crop Protection, Inc.

2. Environmental Petitioners were Baykeeper, Californians for Alternatives to Toxics, California Sportfishing Protection Alliance, Environment Maine, National Center for Conservation Science and Policy, Oregon Wild, Peconic Baykeeper, Inc., Saint John's Organic Farm, Soundkeeper, Inc., Toxics Action Center, and Waterkeeper Alliance.

3. The Environmental Protection Agency was the respondent.

RULE 29.6 STATEMENT

Agribusiness Association of Iowa. Agribusiness Association of Iowa has no parent corporation and no publicly held corporation owns 10% or more of its stock.

BASF Corporation. BASF Corporation is the wholly owned subsidiary of BASF Americas Corporation, which in turn is 100% owned by BASFIN Corporation, which in turn is 100% owned by BASF Aktiengessellschaft.

CropLife America. CropLife America has no parent corporation and no publicly held corporation owns 10% or more of its stock.

FMC Corporation. FMC Corporation has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Responsible Industry for a Sound Environment. Responsible Industry for a Sound Environment is a standing committee of CropLife America and is not a separate legal entity. Responsible Industry for a Sound Environment has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Southern Crop Production Association. Southern Crop Production Association has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Syngenta Crop Protection, Inc. Syngenta Crop Protection, Inc. is a wholly owned subsidiary of Syngenta Seeds, which in turn is 100% owned by Syngenta Corporation, which in turn is 100% owned by Syngenta Participations Ag, which in turn is 100% owned by Syngenta AG.

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OPINION BELOW

The court of appeals' opinion is reported at 553 F.3d 927 and reproduced at Pet.App.1a.

JURISDICTION

The court of appeals had jurisdiction pursuant to 33 U.S.C. §1369(b). The court of appeals filed its opinion on January 7, 2009, and denied petitioners' timely petition for rehearing and rehearing en banc on August 3, 2009. Pet.App.1a; Pet.App.64a. This Court's jurisdiction rests on 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Clean Water Act, 33 U.S.C. §§1251-1387, are set forth in the Appendix at Pet.App.75a.

STATEMENT OF THE CASE

In the more than 35 years since Congress enacted the CWA, pesticides used for their intended purpose have never been subjected to the CWA's demanding permitting requirements. The Sixth Circuit's decision in this case reverses that long-standing EPA practice and calls for the biggest expansion of the NPDES program in the history of the CWA. Several courts of appeals' decisions in recent years had generated uncertainty among the regulated community, state and local regulators, and the general public over the scope of the CWA's permitting requirements in the context of pesticide applications, and prompted EPA to issue the regulation at issue here (the "Rule") to eliminate the confusion and ratify the longstanding agency practice of not subjecting such applications to permitting. The Rule was issued following notice and comment and addressed specific circumstances in

which the use of pesticides on, over or near waters in accordance with all relevant requirements of FIFRA is not a "discharge of a pollutant" to waters of the United States.

Timely petitions for review of EPA's Rule were filed in the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits, and were consolidated by the Judicial Panel for Multidistrict Litigation for review before the Sixth Circuit. In the decision below, the Sixth Circuit invalidated EPA's Rule, finding that—notwithstanding the more than 35 years of administrative practice supporting the Rule—the Rule was categorically barred by the terms of the CWA. That decision cannot be squared with a commonsense reading of the CWA and conflicts with the decisions of this Court and other circuits interpreting similar statutory provisions, including this Court's intervening decision in *Burlington Northern & Santa Fe Railway Co. v. United States*, 129 S. Ct. 1870 (2009). More fundamentally, the Sixth Circuit's decision conflicts with the decisions of this Court and other circuits on the deference owed to administrative statutory interpretations. A more concrete circuit split is not possible because petitions for review filed in *ten* other circuits were consolidated for review before the Sixth Circuit in this case. Indeed, the fact that the Sixth Circuit's decision in this case effectively speaks for ten other federal circuits makes the need for this Court's review here all the more imperative.

Absent review by this Court, the Sixth Circuit's decision will require the most sweeping expansion of the NPDES program in the history of the CWA. As EPA has acknowledged, the decision "will cause

significant disruption among the hundreds of thousands of persons and businesses nationwide who apply pesticides to or over, including near, waters of the United States without NPDES permits and now, as a result of the [Sixth Circuit]'s decision, will need to obtain permits in order to continue doing so consistent with the [CWA]." Pet.App.106a-07a. Such a profoundly misguided and devastatingly disruptive decision warrants this Court's review. At a minimum, however, the Court should vacate the decision below and remand for consideration in light of this Court's decision in *Burlington Northern*.

A. Statutory Background

1. *The Clean Water Act*

Along with other more general programs designed "to restore and maintain the chemical, physical and biological integrity of the Nation's waters," 33 U.S.C. §1251(a), the statute includes a permitting program that prohibits the "discharge of any pollutant" from a "point source" into navigable waters unless EPA (or a delegated state) issues an NPDES permit. *Id.* §§1311(a), 1342. The Act defines "discharge of a pollutant" to mean the "addition of any pollutant to navigable waters from any point source." *Id.* §1362(12). It defines "pollutant" to mean several specifically listed categories of materials, including "chemical wastes" and "biological materials." *Id.* §1362(6).

The Act imposes significant civil (and potentially criminal) penalties for any unauthorized pollutant discharge or violation of permit conditions—up to $37,500 per violation, per day. *See id.* §1319(b), (c); 40 C.F.R. §19.4 (2009).

The only CWA provision that specifically refers to pesticides is Section 104(l), which required EPA to develop information on the effects of pesticides in water and methods to control releases of pesticides into the environment, and to make "recommendations for any necessary legislation" to implement those methods. 33 U.S.C. §1254(*l*)(2).

2. *The Federal Insecticide, Fungicide and Rodenticide Act*

Three days after Congress enacted the CWA, it passed comprehensive amendments to FIFRA. *See* 7 U.S.C. §§136-136y; Pub. L. No. 92-516, 86 Stat. 973 (1972). Under FIFRA, all pesticides sold in the United States must be registered with EPA, which will accept such registration only if it finds that the chemical "when used in accordance with widespread and commonly recognized practice ... will not generally cause unreasonable adverse effects on the environment." 7 U.S.C. §136a(c)(5)(D). EPA issues a "label" for each registered chemical, setting forth the manner in which it may be used; the statute makes it unlawful "to use any pesticide in a manner inconsistent with its labeling." 7 U.S.C. §136j(a)(2)(G).

Under FIFRA, EPA conducts a rigorous evaluation of the potential impact of pesticides on water quality. Unlike the CWA, FIFRA requires actual testing of pesticides (lasting years and involving numerous layers of review), before a registration can be issued, to determine the pesticide's toxicity to fish and aquatic organisms and the anticipated levels in

natural water bodies and drinking water supplies.[1] EPA bases its registration decisions on a detailed assessment of a pesticide's potential effects on human health and the environment, imposing restrictions in the registration where necessary to ensure that pesticide concentrations in water from authorized uses are safe.[2] Before a FIFRA registration can be approved, the Federal Food Drug and Cosmetic Act ("FFDCA") also requires proof to a "reasonable certainty" that pesticide levels in drinking water resulting from authorized use will be safe to humans.[3] (Indeed, most pesticides never make it to market in part because of FIFRA's rigorous standards.)

B. CWA Litigation Over Pesticide Applications

The possibility of regulating pesticide use as a CWA "pollutant" discharge was first raised in a series of citizen suits brought in the Ninth and Second Circuits in the late 1990s. *See* Pet.App.27a. These lawsuits generated several decisions in different courts

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1 *See, e.g.*, 40 C.F.R. §158.630 (identifying studies required to determine effects on terrestrial and aquatic non-target organisms); 40 C.F.R. §158.1300 (identifying environmental fate and effects studies required to assess potential exposure to pesticide residues, including in water).

2 *See, e.g.*, 7 U.S.C. §136a(a); EPA, *Water Quality Data Submissions: OPP Standard Operating Procedures: Inclusion of Water Quality & Impaired Water Body Data in OPP's Registration Review Risk Assessment & Management Process, available at* http://www.epa.gov/oppsrrd1/registration_review/water_quality_sop.htm (last visited Nov. 2, 2009).

3 21 U.S.C. §346a(b)(2)(A)(ii).

of appeals that produced confusion regarding the application of the CWA's permitting requirements to the use of pesticides.

In *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526, 528, 530, 532-33 (9th Cir. 2001), the Ninth Circuit held that residuals that remained after application of a pesticide to an irrigation canal constituted a "chemical waste" and therefore a "pollutant." In *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1183-85 (9th Cir. 2002), the Ninth Circuit similarly held that aerial spraying of pesticide to a forest canopy directly over streams was a discharge of a pollutant requiring an NPDES permit. In *Fairhurst v. Hagener*, 422 F.3d 1146, 1150-51 (9th Cir. 2005), however, the Ninth Circuit found that a pesticide application was not a "discharge of a pollutant" where it was applied in compliance with FIFRA, did not leave residue, and had no "unintended effects."

Two citizen suits in the Second Circuit also sought to impose CWA permitting on pesticide applications, but in neither case did the court address the merits in its decision. In *Altman v. Town of Amherst, N.Y.*, 47 Fed. Appx. 62, 66-67 (2d Cir. 2002), the court specifically called on EPA to resolve the uncertainty over such pesticide applications and reversed the lower court's dismissal of a suit over mosquito-control spraying, holding that discovery should have been allowed on the circumstances of the application. Additionally, in *No Spray Coalition, Inc. v. City of New York*, 351 F.3d 602, 605-06 (2d Cir. 2003), the court held that pesticide use in substantial compliance with FIFRA did not in and of itself render the CWA citizen suit provision inapplicable, but specifically did not

address the "complex question" of whether a pesticide application constitutes a CWA discharge of a pollutant.

C. EPA's Final Rule

The citizen suits described above resulted in considerable uncertainty among forest landowners, public health officials, and others regarding whether (and under what circumstances) the application of pesticides triggered NPDES permitting requirements. Following notice and comment and codifying more than 35 years of state and EPA practice, EPA issued the final Rule to clarify that certain pesticide applications made in compliance with relevant FIFRA requirements on, over or near navigable waters were not subject to NPDES permitting requirements. Application of Pesticides to Waters of the United States in Compliance with FIFRA, 71 Fed.Reg. 68,483 (Nov. 26, 2006), Pet.App.23a-55a.

The Rule focused on the two specific types of pesticide applications that had been the primary target of the citizen suits: (1) those made directly to waters, and (2) those made to control pests that may be present over or near waters, where a portion of the pesticide application will unavoidably be deposited to waters in order to target the pests effectively.[4] Pet.App.55a. So long as the pesticide application is made in compliance with relevant FIFRA requirements, the Rule found

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[4] In the preamble, EPA clarified that the Rule addressed only these two limited types of pesticide applications, and was not intended to cover terrestrial pesticide applications where there might be "drift over and into waters of the United States." Pet.App.37a.

that those applications would not constitute a "discharge of a pollutant."

EPA concluded that chemical pesticides used as set forth in the Rule are not "pollutants" because they are not "chemical wastes," but products being used for their intended purpose. Pet.App.33a. In contrast, the preamble to the Rule concluded that excess or residual pesticides remaining after use could be considered "pollutants." But because the application of the pesticide for its intended purpose did not involve the intentional discharge of excess or residuals (*i.e.*, all of the pesticide was applied for the purpose of targeting pests in, over or near waters), there was no "pollutant" at the time of discharge and the application therefore did not constitute the "discharge of a pollutant." Pet.App.36a. In CWA parlance, therefore, the excess or residual pesticide would be considered "nonpoint source" pollution, which is addressed under CWA programs separate from the NPDES permitting program. Pet.App.37a.[5]

The Rule suggests, however, that where an application of a pesticide was *not* made in conformance

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[5] Although the CWA definition of "pollutant" includes both "chemical wastes" and "biological materials," EPA found that biological pesticides should be treated comparably to chemical pesticides under the Rule. Pet.App.33a-34a. EPA based its conclusion on the fact that biological pesticides were uncommon when the CWA definition was enacted—such that the different statutory language would not have evidenced any Congressional intent to treat biological pesticides differently—and that modern biological pesticides are typically "reduced-risk products," which Congress could not have intended to subject to more onerous requirements than chemical pesticides. Pet.App.33a-35a.

with relevant FIFRA requirements, that application could be deemed the "discharge of a pollutant" and subject to NPDES permitting requirements. Pet.App.43a-44a. In this regard, the Rule actually extended CWA permitting beyond what had ever been imposed before, as EPA had never previously subjected to CWA permitting any application of pesticides for their intended purposes.[6]

D. The Sixth Circuit's Decision

The Rule was challenged in eleven different courts of appeals and consolidated in the Sixth Circuit, which vacated the Rule, holding that it was unambiguously foreclosed by the CWA. Pet.App.2a. Although the court agreed with EPA that the common meaning of "chemical waste" is "discarded," "superfluous," or "excess" chemical, it ruled that any useful chemical containing portions that *will become* waste must itself be regulated as a "chemical waste." Pet.App.14a-15a. Pointing to the Ninth Circuit's decision in *Fairhurst*, the court concluded that chemical pesticides "must be regulated" as "chemical wastes" unless they are "intentionally applied to the water and ... leave[] no excess portions after performing [their] intended purpose." Pet.App.14a-16a.[7] The Sixth Circuit

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[6] Some industry petitioners challenged EPA's interpretation that noncompliance with relevant FIFRA requirements may cause pesticide use to be deemed a CWA pollutant discharge. Petitioners are not seeking review of the denial of those claims.

[7] The Sixth Circuit also concluded that "if we are to give meaning to the word 'waste' in 'chemical waste,' we must recognize Congress's intent to treat biological and chemical pesticides differently," such that the plain language of the CWA

(continued...)

reached this conclusion on the ground that the CWA is susceptible to no other reasonable interpretation and thus rejected EPA's argument that the CWA was ambiguous on the question presented.

The Sixth Circuit went even further, however, concluding that "chemical pesticide residuals" added to water necessarily come from point sources that must be permitted under the Act. Pet.App.21a. In so doing, the court not only disregarded the considered interpretation of the expert agency charged with administering the CWA and more than 35 years of administrative practice, but created its own "but for" test that has no footing in the statute, and that goes far beyond anything endorsed by EPA or other courts. Specifically, the Sixth Circuit found that the "plain language" of the CWA *mandates* a holding that there is a "discharge of a pollutant" subject to NPDES permitting whenever a pesticide residue makes its way to navigable waters. *Id.* ("[B]ut for the application of the pesticide, the pesticide residue and excess pesticide would not be added to the water; therefore, the pesticide residue and excess pesticide are from a 'point source.'").

Accordingly, the court held that "dischargers of pesticide pollutants are subject to the NPDES permitting program," and that "the statutory text of the [CWA] forecloses the EPA's Final Rule." Pet.App.21a-22a.

(continued)
requires that "matter of a biological nature, such as biological pesticides" be deemed a pollutant, whether or not it leaves any residue or excess. Pet.App.16a-17a.

E. EPA's Response to the Decision

Although EPA vigorously defended the Rule before the Sixth Circuit, EPA has sent mixed signals in the wake of the decision and the change in Administrations. On the one hand, EPA has not disavowed the policy and legal determinations made in the Rule. Indeed, in characterizing the court's decision, EPA has stated that the Sixth Circuit "did not defer to EPA's interpretation of th[e] *ambiguous* statutory term" "pollutant," Pet.App.169a (emphasis added), indicating that EPA has not abandoned its position that the Act is ambiguous. On the other hand, the United States did not seek rehearing of the court's decision and, instead, took the position—without addressing the merits of the Sixth Circuit's decision—that further review was not warranted because it and the NPDES-authorized state agencies can manage permitting for pesticide use through the device of "general permits" authorized under EPA rules. *See* Pet.App.105a-23a; 40 C.F.R. §122.28 (2009).

Significantly, however, EPA acknowledges the dramatic changes and substantial risks the Sixth Circuit's ruling has produced. Indeed, EPA has argued that the Sixth Circuit's decision will not only seriously impede important public health initiatives, but also result in "substantial disruption to the regulated program and the regulated community." Pet.App.110a. EPA admits that the Sixth Circuit's decision will increase the scope of the NPDES permitting program (currently at approximately 46,000 individual permits and 466,000 general permits), Pet.App.130a-31a, by 365,000 new permittees and ***5.6 million pesticide applications*** per year. Pet.App.126a-27a. And EPA urged the Sixth Circuit to stay its mandate for *two*

years—which EPA concluded was the bare minimum amount of time necessary for it to attempt development of "general permits" to cover these pesticide applications. But while EPA has bought itself time to attempt to implement the decision below, the question remains whether the Sixth Circuit properly held that the CWA mandated that extraordinarily burdensome and far-reaching regulatory undertaking.

REASONS FOR GRANTING THE WRIT

The decision below overturns more than three decades of EPA practice and mandates the greatest expansion of the NPDES program since the CWA was enacted in 1972. It will engulf into that program an estimated minimum of 5.6 million pesticide applications annually that have never before required permits and were never envisioned to be within the NPDES program—by either the government or the statute. Thus, the decision below will—in the words of EPA—"cause significant disruption among the hundreds of thousands of persons and businesses nationwide who apply pesticides to or over, including near, waters of the United States without NPDES permits and now, as a result of the [Sixth Circuit]'s decision, will need to obtain permits in order to continue doing so consistent with the [CWA]." Pet.App.106a-07a. The affected pesticide applicators include local governments that use pesticides to control mosquitoes to protect public health, farmers who use pesticides in certain operations, foresters who use pesticides to protect timber, and even federal entities such as the U.S. Coast Guard, which uses pesticides to kill insects that interfere with the maintenance of navigation devices. Pet.App.107a. Few decisions in the history of the

CWA have had such a far-reaching and disruptive impact.

Remarkably, the Sixth Circuit reached the conclusion that Congress *unambiguously* intended that astonishing result and thus foreclosed the issuance of EPA's Rule ratifying more than 35 years of administrative practice recognizing that the pesticide applications at issue are not subject to NPDES permitting requirements. The Sixth Circuit's decision not only defies common sense, it defies a fair reading of the Act's terms, the history of the Act, and longstanding agency practice. More fundamentally, in substituting its judgment for that of the expert agency charged with administering the CWA, the Sixth Circuit flouted the teachings of this Court in *Chevron v. Natural Resources Defense Council* 467 U.S. 837 (1984), and dozens of subsequent decisions up through *Entergy v. Riverkeepers*, 129 S. Ct. 1498 (2009) and *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458, 2463 (2009) this past Term, regarding the deference owed to an agency's considered interpretation of a statute that it administers. Importantly, the Sixth Circuit's decision also conflicts with the decisions of this Court and other circuits construing similar statutory provisions, including the Court's intervening decision in *Burlington Northern & Santa Fe Railway Co. v. United States*, 129 S. Ct. 1870 (2009).

Certiorari is warranted to review the Sixth Circuit's decision in this case. Indeed, absent review in this case, there will be no further opportunity for review by this Court on the questions presented before CWA liability and permitting requirements are imposed on virtually all pesticide use in, over, or near

waters. At a minimum, however, the Court should grant the petition, vacate the decision below, and remand this case to the Sixth Circuit for further consideration in light of the Court's intervening decision in *Burlington Northern.*

I. THE DECISION BELOW IS PROFOUNDLY MISGUIDED AND CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS

The Sixth Circuit's decision in this case effectively binds the *ten* other federal circuits from which petitions for review were transferred and consolidated by the Judicial Panel on Multidistrict Litigation and constitutes the final say—absent further review by this Court—on the validity of one of the most significant and most-anticipated rules promulgated by EPA in years. That decision, however, is fundamentally flawed and conflicts with the decisions of this Court and other federal circuits in several important respects.

A. The Sixth Circuit's Decision Disregards Settled Principles Governing The Deference Owed To Agency Statutory Interpretations.

The Sixth Circuit ruled that "chemical waste" unambiguously includes useful chemical pesticide *products* that may ultimately leave some small amount of residue, Pet.App.15a, even where the applicator does not *intend* to dispose of the pesticide. The court did not dispute that the common meaning of "chemical waste" is "discarded," "superfluous," or "excess" chemical. Pet.App.13a-14a. Nor did the court dispute that the Rule applies *only* to pesticide *products* that are *intentionally* applied to, over, or near water to perform their *intended* purpose of controlling pests in,

over, or near water, or that pesticide products are thoroughly regulated under FIFRA and applied for an intended and beneficial use. Pet.App.5a-6a. Yet the court nevertheless concluded that the product being applied for its intended purpose is indistinguishable from any future excess or residue that might remain after use. *See* Pet.App.16a. And what is perhaps most remarkable, the court concluded that the CWA was susceptible to no other interpretation and thus rejected EPA's forceful defense of its Rule.

In concluding that the CWA unambiguously foreclosed EPA's Rule, the Sixth Circuit seriously misconstrued the statutory provisions at issue and reached a conclusion that conflicts with the decisions of this Court and other circuits construing analogous statutory provisions. *See infra* at 14-19. Even more fundamentally, however, the court seriously departed from the teachings of this Court on the deference owed agency statutory interpretations and improperly substituted its judgment for that of the expert agency charged with administering the CWA. The court's failure to heed this Court's teachings infected its entire statutory analysis.

The Sixth Circuit began its decision with a perfunctory recitation of the *Chevron* standard of review, Pet.App.8a-9a, and purported to reject the Rule based on what has become known as *Chevron* "Step One." Yet the court's invalidation of the Rule relies exclusively on its own interpretation of general statutory terms and general statutory purposes, *see, e.g.*, Pet.App.19a-20a, with no consideration of contextual evidence or legislative history regarding Congress's intent on the specific question at issue. In this respect, the Sixth Circuit's "Step One" analysis

omits any meaningful consideration of whether Congress has "directly spoken to the precise question at issue," and pretermits the basic determination of whether the agency's interpretation of the statute is permissible. *Cf. Chevron*, 467 U.S. at 842. By prematurely declaring the provisions at issue to be capable of only *one* interpretation—when they surely were susceptible, at a minimum, to two different interpretations—the Sixth Circuit effectively cut off the *Chevron* analysis at the threshold and deprived the agency of the deference owed to its statutory interpretations under the second step of the *Chevron* inquiry.

The Sixth Circuit's *Chevron* analysis directly conflicts with the decisions of this Court. As *Chevron* and many other decisions of this Court make plain, in determining whether a phrase is ambiguous, the court must look not only at the particular provision at issue, but should employ all the traditional tools of statutory construction. *Id.* at 843 n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."); *accord Regions Hosp. v. Shalala*, 522 U.S. 448, 456 (1998) ("If, by 'employing traditional tools of statutory construction,' we determine that Congress' intent is clear, 'that is the end of the matter.'"). Thus, as this Court stressed in *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007), "[i]n making the threshold determination under *Chevron*, 'a reviewing court should not confine itself to examining a particular statutory provision in isolation'" and, instead, should make that determination by looking at the statutory terms "in context." When the statutory provisions at issue are

viewed in this light, there is considerable evidence that Congress *did* consider the subject of pesticide use in connection with the CWA and chose *not* to subject pesticide use to NPDES permitting. But at a bare minimum, as EPA argued in the court of appeals, *see* EPA Br. 17-25 (filed Dec. 19, 2007), there is sufficient ambiguity to trigger an inquiry into whether EPA's Rule was reasonable. *See infra* at I.B., I.C.

B. The Sixth Circuit's Decision Conflicts With The Decisions Of This Court And Other Circuits Construing Similar Statutory Provisions.

When it comes to the text of the CWA, the Sixth Circuit's interpretation of the provisions at issue not only defies common sense, it directly conflicts with the decisions and analysis of this Court and other circuits construing analogous statutory provisions. This Court's decision in *Burlington Northern*—which was issued after the Sixth Circuit's decision in this case—is particularly instructive.

In *Burlington Northern*, the Court reviewed a Ninth Circuit decision that used highly analogous reasoning to that employed by the Sixth Circuit below in finding Shell Oil Company liable under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") for "arrang[ing] for disposal" of a hazardous substance where Shell sold and delivered a pesticide to an agricultural chemical distribution company and some of the pesticide spilled during transfer. 129 S. Ct. at 1875, 1877. This Court reversed, holding that Shell Oil could not be held liable under CERCLA for "arrang[ing] for disposal" of a hazardous substance because Shell did not *intend* to dispose of the pesticide. *Id.* at 1880. The

Court looked to the "ordinary meaning" of the term "arrange for," and found that "under the plain language of the statute, an entity may qualify as an arranger ... when it takes intentional steps to dispose of a hazardous substance." *Id.* at 1879. Therefore, the Court concluded "knowledge [of spillage of the product] alone is insufficient to prove that an entity 'planned for' the disposal, particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product." *Id.* at 1880.

The Sixth Circuit below committed the same basic error as the Ninth Circuit in *Burlington Northern*. The court glossed over the ordinary meaning of "waste"—finding the pesticide applications at issue to be "chemical waste" because a small portion of the pesticide applied for its intended use may eventually result in excess pesticide deposited on water. *See* Pet.App.15a. But a pesticide applied for its intended beneficial purpose is not a "waste"—just as the pesticide product sold in *Burlington Northern* was not "waste." In both instances, the pesticide at issue was a valuable product serving its intended purpose (in this case even more so, as the Rule applies to the pesticide's actual use), and it is implausible that these products were intended for disposal. The term "waste," like the term "arrange for disposal," implies an *intention* to discard, not the use or sale of a beneficial product. *See Burlington Northern*, 129 S. Ct. at 1879 ("In common parlance, the word 'arrange' implies action directed to a specific purpose.... impl[ies] intentional action.").[8]

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[8] Indeed, this case follows *a fortiori* from *Burlington Northern*. As the Ninth Circuit found in *Burlington Northern*, (continued...)

Thus, as in *Burlington Northern*, any small amount of excess pesticide that might reach navigable waters would be the "peripheral result" of the legitimate application of a useful product. (Indeed, here the pesticide is being applied for its intended purpose, rather than being accidentally spilled during transfer, as was the case in *Burlington Northern*.) And as in *Burlington Northern*, knowledge that this legitimate application may result in some pesticide reaching navigable waters should be insufficient to render the pesticide at the time it is applied a "chemical waste" within the meaning of the CWA—particularly in light of the fact that EPA accounts for potential human health and environmental impacts from any such excess pesticide when it evaluates whether that pesticide meets the registration standard under FIFRA. *See supra* at 4-5.[9] The Sixth Circuit's flawed statutory analysis is directly contrary to this Court's intervening decision in *Burlington Northern*.

The Sixth Circuit's flawed interpretation of "chemical waste" also conflicts with the Second

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(continued)
CERCLA's definition of "disposal" included examples of *unintentional* acts such as "spilling" and "leaking." 129 S. Ct. at 1877. Yet, this Court still concluded that the term "arrange for disposal" implies an *intention* to discard. *Id.* Because none of the statutory provisions at issue in this case explicitly refer to unintentional acts like "spilling" and "leaking" the conclusion that Congress was focused on intentional acts is even stronger.

9 The Sixth Circuit, however, found just the opposite when it rejected EPA's position that "at the time of discharge [*i.e.*, the pesticide application], the pesticide is a nonpollutant, and the excess pesticide and pesticide residues are not created until later." Pet.App.19a.

Circuit's recent decision in *Cordiano v. Metacon Gun Club*, 575 F.3d 199, 206-07 (2d Cir. 2009). In that case, the Second Circuit held that the discharge of lead shot as part of the normal and intended use of that product on a shooting range does not render the lead "abandoned by being disposed of" within meaning of the Resource Conservation and Recovery Act ("RCRA") regulations defining "solid waste." Contrary to the Sixth Circuit below, the Second Circuit held that EPA's interpretation "that materials put to their ordinary, intended use are not 'abandoned' under the regulatory definition of solid waste ... is consistent with the RCRA." *Id.* at 208.

The Second Circuit's approach of considering whether a product is put to its normal and intended use when determining whether it is regulated as "solid waste" is consistent with this Court's decision in *Burlington Northern* and is fully supported by the statutory language of RCRA and EPA's implementing regulations. *See* 42 U.S.C. §6903(27) (defining "solid waste" as "discarded material ... resulting from industrial, commercial, mining, and agricultural operations, and from community activities ...."); 40 C.F.R. §261.2(b)(1) ("Materials are solid waste if they are abandoned by being: ... [d]isposed of ....").[10] The

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[10] Thus, EPA has clarified that "it does not have statutory authority under RCRA to regulate materials which are products and not wastes," 60 Fed. Reg. 25,492, 25,532 (May 11, 1995), and EPA does not regulate pesticides under RCRA until they are "discarded." 40 C.F.R. §261.2(a)(1); *see also* 40 C.F.R. §261.2(c)(1)(ii) (commercial chemical products "are not solid wastes if they are applied to the land and that is their ordinary manner of use").

Second Circuit's approval of EPA's logical interpretation of RCRA—in which lead shot that is used as it is intended is not considered waste simply because it may end up on the ground as a peripheral result of its use—is flatly inconsistent with the Sixth Circuit's interpretation of the Clean Water Act, in which beneficial product that is used as it is intended is considered "waste" simply because it may result in a small amount of excess pesticide being deposited on the water.

Although this Court's decision in *Burlington Northern* interpreted CERCLA and the Second Circuit's decision in *Metacon Gun Club* interpreted RCRA, the similarities in terminology, statutory framework and Congressional intent support application of the Court's reasoning to this case. CERCLA and RCRA focus on the regulation of "waste," or materials being "disposed of"—as did the Sixth Circuit's interpretation of "chemical waste" in this case. "Waste" like "arrange for disposal," implies an intent to dispose of rather than the use or sale of a beneficial product. *See Burlington Northern*, 129 S. Ct. at 1879. Likewise, the RCRA definition of waste—"discarded material" or material that is "disposed of"—also implies such an intent. *Cf. Metacon Gun Club*, 575 F.3d at 208 (finding that lead shot is not "disposed of" when put to its *intended* use). These interpretations are entirely consistent with the primary statute for regulating pesticide use—FIFRA—because FIFRA defines pesticides as substances "intended" for pesticidal purposes. 7 U.S.C. §136(u). Moreover, these cases illustrate that the

analogous provisions of the CWA are at the very least subject to more than one interpretation.[11]

C. The Sixth Circuit's Decision Belies The Text, Structure, And History of the CWA, As Well As EPA's Longstanding Interpretation Of The Act.

Numerous additional considerations belie the Sixth Circuit's holding that the CWA *unambiguously* forecloses EPA's Rule allowing the use of pesticide applications in the circumstances at issue.

1. Contrary to the Sixth Circuit's apparent belief, the NPDES program is not the *only* mechanism for achieving the Act's goals. Rather, the Act includes many nonpoint source programs focused on, among other things, addressing water quality impacts from agricultural activities (which presumably would include pesticide use). *See, e.g.*, 33 U.S.C. §1329 (nonpoint

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[11] Similarly, the Sixth Circuit's conclusion that "'biological materials' cannot be read to exclude biological pesticides or their residuals" also warrants this Court's review. Pet.App.16a-17a. Both this Court and the Ninth Circuit have found that the term "materials" in the CWA pollutant definition (*e.g.*, "biological materials" and "radiological materials") does *not* mean all matter. *See, e.g., Train v. Colo. Pub. Interest Research Group, Inc.*, 426 U.S. 1, 23-25 (1976); *Ass'n to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1016-18 (9th Cir. 2002). Moreover, there must be some limiting principle on the term "biological materials" to avoid absurd results—such as NPDES permitting for a worm on the end of a fisherman's line. For these reasons, the meaning of "biological materials" is not unambiguous on the face of the statute. It is in precisely this situation that courts must defer to the authorized agency's reasonable interpretation. *See Entergy v. Riverkeepers*, 129 S. Ct. 1498, 1505 (2009).

source management programs); *id.* §1288(b)(2)(F) (process for identifying appropriate controls for agricultural and silvicultural nonpoint sources); *id.* §1254(p) (study and research program to reduce pollution from agriculture). And as noted above, Section 104(l) is the only CWA provision that refers to the water quality impact of pesticides. That provision does not characterize pesticides as "pollutants" and requires only investigation of "methods to control the release of pesticides into the environment" and "recommendations for any necessary legislation"—language that, at a bare minimum, does not unambiguously mandate regulation of such pesticide applications under the NPDES program.[12] *Id.* §1254(*l*).

2. Moreover, the Sixth Circuit's reading of the CWA conflicts with the Act's history and fails to account for FIFRA. Three days after passing the 1972 CWA, Congress enacted major amendments to FIFRA, creating a radically different statutory scheme. Unlike the CWA NPDES program, which is fundamentally a program to eliminate pollutant

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[12] Consistent with this understanding, in comments on these provisions, Senator Dole emphasized that "[p]esticides provide substantial benefits to mankind by protecting plants and animals from pest losses," and that "[t]he use of pesticides and other agricultural chemicals will undoubtedly retain a high level of importance in agriculture for the foreseeable future. In the meantime efforts at both State and Federal levels are paying off in securing the registration [pursuant to FIFRA] and adherence to recommended usages." S. Rep. No. 92-414, at 92 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3760.

discharges from wastewater,[13] FIFRA is designed to regulate beneficial activities (pesticide applications) that may also have adverse environmental effects. Congress mandated that under FIFRA, EPA is to assess the adverse environmental effects, including the effects on water,[14] of registered pesticides and impose restrictions where necessary such that the pesticide usage will not cause "unreasonable adverse effects on the environment." *See* 7 U.S.C. §§136j(a)(2)(G), 136a(c)(5)(C). Not only does EPA evaluate the effect of pesticides on water quality through "impacts on both human health from the presence of pesticides in drinking water, and on aquatic resources (*e.g.*, fish, invertebrates, plants, and other species in fresh water, estuarine, and marine environments)," Pet.App.42a, EPA also considers water quality when it determines how pesticides may be applied and dictates conditions regarding "application rates, active ingredient concentrations and dilution requirements, buffer zones, application locations, intended targets, times of day, temperature or other application requirements, [concerning] ... the amounts, concentrations, and viability of substances that may potentially end up in

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[13] *See, e.g.*, EPA, Office of Wastewater Management, *Water Permitting 101*, at 2, 5 *available at* http://www.epa.gov/npdes/pubs/101pape.pdf (last visited Nov. 2, 2009) (The CWA "created the system for permitting *wastewater* discharges (Section 402), known as the National Pollutant Discharge Elimination System (NPDES).... [T]he primary focus of the NPDES permitting program is municipal and non-municipal (industrial) direct dischargers.") (emphasis added).

[14] FIFRA's definition of "environment" includes "water." 7 U.S.C. §136(j).

waters of the United States ...." Pet.App.32a. Pesticide users must comply with the requirements imposed by EPA and reproduced on the label, *see* 7 U.S.C. §136j(a)(2)(G), but need not seek advance government authorization to use those pesticides.

Reading the term "chemical waste" in the context of these other provisions, therefore, demonstrates that Congress considered the impacts of pesticide use in enacting the CWA and determined they should not be addressed through the NPDES program. At the very least, as the government forcefully argued before the court of appeals, this history and context precludes the Sixth Circuit's conclusion that Congress *unambiguously required* the regulation of pesticide use as a CWA pollutant discharge. *See* EPA Br. 12, 42-45; *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand").

3. The regulatory history of the CWA also starkly belies the Sixth Circuit's interpretation. For the entire 35-year period since enactment of these two statutes, EPA has regulated pesticide use under FIFRA and not under the NPDES permitting program—an interpretation that is a logical result of harmonizing these statutes. *See* EPA Br. 34-41. EPA's interpretation of the statutory scheme gives effect to FIFRA's role in regulating the impact of pesticides on water quality when used as intended while the Sixth Circuit's holding ignores the framework established by Congress by, in effect, interpreting the NPDES program as nullifying aspects of FIFRA regulation. EPA's contemporaneous—and

consistent—interpretation warrants deference. *See, e.g., Entergy v. Riverkeeopers*, 129 S. Ct. 1498, 1509 (2009) ("While not conclusive, it surely tends to show that EPA's current practice is a reasonable and hence legitimate exercise of its discretion ... that the agency has been proceeding in essentially this fashion for over 30 years."); *Barnhart v. Walton*, 535 U.S. 212, 220 (2002) ("[T]his Court will normally accord particular deference to an agency interpretation of 'longstanding' duration."); *see also Coeur Alaska*, 129 S. Ct. at 2477.

4. Moreover, over the period during which EPA clearly signaled that pesticide applications were not subject to NPDES permitting, the CWA underwent two major reauthorizations—and during both of these reauthorizations, Congress clarified its intentions with respect to the scope of coverage of the NPDES program. Congress in the 1977 CWA amendments modified specific statutory language to negate the effect of a federal court decision that would have required NPDES permits for return flows from irrigated agriculture and exempted such discharges from NPDES coverage. *See* 33 U.S.C. §§1342(*l*)(1), 1362(14). In its decision, Congress explicitly acknowledged that implementing the NPDES program was very resource intensive for EPA and the states which had assumed the program and declined to impose the significant and unnecessary resource burden that would be required if the NPDES program were applicable to agriculture. Senate Committee on Environment and Public Works, 95th Cong., *Legislative History of the Clean Water Act of 1977*, Serial No. 95-14, at 318 (1978).

In contrast, in the 1987 amendments to the CWA, Congress explicitly *expanded* the applicability of the

NPDES program, mandating that EPA develop NPDES permits for discharges of industrial and municipal stormwater—discharges which had not been generally regulated by EPA under the NPDES program. *See* 33 U.S.C. §1342(p). Recognizing once again the resource-intensive nature of the NPDES program, Congress provided a schedule for the development of the program, with deadlines for EPA regulations, permit applications, and the issuance or denial of stormwater permits. *See* 33 U.S.C. §§1342(p)(4)(A)-(B), (p)(6). When given the opportunity to include pesticides within the NPDES regime, however, Congress—which is presumed to be aware of EPA's practice of *not* subjecting pesticide applications to NPDES permitting during this period—once again declined.

The fact that Congress did not signal any disagreement with EPA's practice in not subjecting pesticides to NPDES permitting when it acted to clarify the scope of the NPDES program with respect to other types of discharges provides strong indication that Congress agreed with EPA: pesticides being applied for their intended purpose are not wastes, and thus do not fall within the scope of the term "pollutant" or of the NPDES program. As the Supreme Court held in *Chisom v. Roemer*, 501 U.S. 380, 396 & n.23 (1991), "we are convinced that if Congress had such an intent, Congress would have made it explicitly in the statute, or at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history .... Congress' silence in this regard can be likened to the dog that did not bark."

5. Indeed, it is implausible (if not absurd) to conclude that Congress required EPA to subject pesticide applications to NPDES permitting without saying so explicitly. As this Court has admonished, Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001); *Brown & Williamson Tobacco*, 529 U.S. at 160 ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."). And yet, notwithstanding the far-reaching public health and economic ramifications of subjecting pesticide applications to NPDES permitting (discussed next), there is no evidence whatsoever in the legislative record of the CWA or its amendments that Congress considered this issue, much less unambiguously commanded EPA to subject pesticide applications to NPDES permitting, as the Sixth Circuit held.

In sum, the ambiguous statutory language, the statutory context, and subsequent legislative enactments all serve to negate the Sixth Circuit's conclusion that Congress has unambiguously required the regulation of pesticide use as the "discharge of a pollutant."

II. THE SWEEPING PRACTICAL IMPACT OF THE DECISION BELOW UNDERSCORES THE NEED FOR THIS COURT'S REVIEW

The questions presented are of undeniable national importance. Indeed, the dramatic practical impact of the Sixth Circuit's decision sweeping pesticide usage into the onerous liability and permitting regime of the NPDES program underscores the need for this Court's review.

A. The Sixth Circuit's Decision Represents The Most Dramatic Expansion of the NPDES Program Since Enactment Of The CWA.

Since the CWA's inception, EPA has never issued an NPDES permit for the application of a pesticide or issued any policy interpretation or guidance indicating that such permits were required. *See* Pet.App.26a. EPA has concluded that the Sixth Circuit's decision will single-handedly expand the universe of NPDES permittees by nearly double—and perhaps by many times more. *See* Pet.App.130a.

The combined number of stormwater and non-stormwater discharges within the current program is roughly 520,000. *See* Pet.App.130a-31a. EPA calculates that under a *narrow* reading of the Sixth Circuit's decision, and estimating pesticide applications from only eight categories of pesticide use patterns (*e.g.*, "insecticides used in wide-area insect suppression programs"), the decision will require NPDES permits for roughly ***5.6 million pesticide applications*** per year, by roughly 365,000 "applicators." Pet.App.127a.

The effect of the Sixth Circuit's decision on the scope of the permitting program could be far greater. Many advocates will urge a considerably broader reading of the Sixth Circuit's decision that, if adopted, would multiply even more the number of pesticide uses covered by permit requirements. While EPA's current plans are limited to pesticide application in, over, and "near" waters, other uses can result in the "drift" of miniscule amounts of pesticide into waters. Such "drift" may well be argued by advocates to be within the scope of the Sixth Circuit's flawed reasoning and will certainly be the subject of the next wave of citizen

lawsuits. The 5.6 million applications per year included in EPA's current permitting efforts, therefore, is a number that may be eclipsed by the actual number of permits that will need to be obtained by individuals, governments and other entities that have never been required before to do so.

B. The Sixth Circuit's Decision Threatens Essential Activities That Protect Public Health.

If the Sixth Circuit's decision stands, CWA liability and citizen suit enforcement will serve as a serious impediment to pesticide applications to control mosquito-borne diseases. *See, e.g.*, Pet.App.107a. Mosquito control is critically important to public health. Pet.App.135a. Worldwide, mosquitoes cause more human suffering than any other organism—over one million people die from mosquito-borne diseases every year.[15] Mosquito-borne diseases are still present in the United States, including West Nile Virus and various forms of encephalitis. Pet.App.120a. There is no known vaccine or effective cure for any of these diseases; they are prevented only by controlling mosquito populations.

Spraying for mosquito control has been widely demonstrated as an effective public health intervention,[16] is recommended by the Centers for

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[15] American Mosquito Control Association, *Mosquito-Borne Diseases, available at* http://www.mosquito.org/mosquito-information/mosquito-borne.aspx (last visited Nov. 2, 2009).

[16] *See, e.g.*, Pet.App.161a; Ryan M. Carney et al., *Efficacy of Aerial Spraying of Mosquito Adulticide in Reducing Incidence of West Nile Virus, California, 2005*, 14 Emerging Infectious

(continued...)

Disease Control and Prevention ("CDC") and state health departments[17] and has been confirmed to be safe by EPA and the CDC when used according to the pesticide labels.[18] EPA estimates that more than a thousand local government entities apply pesticides to, over, or near waters to control mosquito populations in the United States. *See* Pet.App.135a.

If the Sixth Circuit's ruling stands and FIFRA-approved application of pesticides are subject to NPDES permitting, local mosquito control organizations will likely be substantially impeded from performing their vital public health function of suppressing mosquito-borne diseases. Preparation and issuance of an individual NPDES permit takes months,

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Diseases 747 (May 2008), *available at* www.cdc.gov/EID/content/14/5/pdfs/747.pdf.

[17] *See, .e.g.*, CDC, *Epidemic/Epizootic West Nile Virus in the United States: Revised Guidelines for Surveillance, Prevention, and Control* (2003), *available at* www.cdc.gov/ncidod/dvbid/westnile/resources/wnvguidelines2003.pdf; California Department of Public Health, *2009 California Mosquito-borne Virus Surveillance and Response Plan* (Apr. 2009), *available at* www.westnile.ca.gov/resources.php.

[18] Extensive reviews of mosquito control pesticides by EPA and CDC in recent years have confirmed their safety. In fact, the majority of the mosquito adulticides routinely used in the U.S. were fully reregistered by EPA between 2006 and 2008, after exhaustive risk assessments, and in all cases, the materials were approved for mosquito control activities over or near water. *See* EPA, *Pesticide Reregistration Status*, *available at* http://www.epa.gov/pesticides/reregistration/status.htm (last visited Nov. 2, 2009).

at a minimum. *See* 40 C.F.R. Part 124 (requiring a detailed permit application; draft permit; fact sheet setting forth the rationale for the permit conditions; minimum 30 day comment permit; opportunity for public hearing; final permit and fact sheet; EPA review and approval; and opportunity for appeal); Pet.App.112a. Nor are general permits a panacea. Monitoring requirements can be extremely expensive—thus taking away funding that mosquito control districts otherwise would use for controlling pest outbreaks. Moreover, environmental groups have challenged many general permits, claiming they provide insufficient opportunity for comment on individual applications and site-specific conditions. *See, e.g.*, *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 489-500, 503-504 (2d Cir. 2005); *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 852-58 (9th Cir. 2003), *cert. denied*, 541 U.S. 1085 (2004). Added to the foregoing is the continued threat of further citizen suit litigation, with its attendant costs of defense, coupled with the potential for fines and attorneys' fee awards.[19] Thus, the threat of CWA liability could seriously hinder—or effectively halt—mosquito control efforts in the United States, which in turn could result in death and serious illness for thousands of people from mosquito-borne illnesses such as West Nile Virus.

Other critical functions also will be jeopardized by the Sixth Circuit's ruling. EPA has noted that the Forest Service relies on pesticides to prevent

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[19] In a period of only weeks following the Sixth Circuit decision invalidating the Final Rule, forty-five local mosquito control agencies in California alone were served with notices of intent to sue for using pesticides without an NPDES permit.

significant outbreaks of pests, such as gypsy moths, in our nation's forests. Pet.App.115a, 157a. The Animal and Plant Health Inspection Service also needs pesticides to prevent or control devastating pest outbreaks, while the U.S. Coast Guard uses pesticides to control pests that interfere with navigational devices. Pet.App.107a, 165a-66a. Pesticides are also necessary to combat algae, weeds and other vegetation in irrigation canals, and to control outbreaks of invasive species such as zebra mussels. Pet.App.115a, 126a-27a.

In sum, the sweeping scope and potentially dire public health consequences of the decision below underscore the need for this Court's review. Although EPA has sought to stave off those consequences by securing an extraordinary *two-year* stay of the decision below, the fact that EPA secured a stay provides no reason to decline consideration of the question whether the Sixth Circuit properly concluded that the CWA unambiguously mandates that EPA embark on this exceptionally burdensome and highly risky administrative undertaking at all.

III. AT A MINIMUM, THE COURT SHOULD GVR THE CASE FOR CONSIDERATION OF THE COURT'S INTERVENING DECISION IN *BURLINGTON NORTHERN*

The Sixth Circuit's decision invalidating EPA's Rule warrants plenary review for the reasons discussed above. At a bare minimum, however, the Court should grant the petition, vacate the decision below, and remand for consideration of this Court's intervening decision in *Burlington Northern*.

In *Lawrence v. Chater*, 516 U.S. 163, 167 (1996), this Court held that, "[w]here intervening developments, or recent developments that we have

reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate." That standard is met here.

As explained above, this Court's decision in *Burlington Northern* fatally undercuts the statutory interpretation undergirding the Sixth Circuit's conclusion that the CWA unambiguously forecloses EPA's Rule. *See supra*, at pp. 14-19. The Sixth Circuit did not have the benefit of the guidance provided by *Burlington Northern*, however, because the Court's decision in *Burlington Northern* was issued months after the Sixth Circuit's decision in this case. Given the misguided nature of the Sixth Circuit's decision and the sweeping practical ramifications of that decision, this Court should at a minimum order the Sixth Circuit to reconsider its decision in light of *Burlington Northern* before that misguided decision is allowed to stand once and for all.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 2, 2009

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE NATIONAL COTTON COUNCIL OF AMERICA, et al., *Petitioners,* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondent.*	Nos. 06-4630; 07-3180/3181/3182/3183/3184/3185/3186/3187/3191/3236

On Petition for Review of Final Action of the United States Environmental Protection Agency. Nos. OW-2003-0063; 40 CFR Part 122.

Argued: April 29, 2008.
Decided and Filed: January 7, 2009.

553 F.3d 927

Before: GUY, SUHRHEINRICH, and COLE, Circuit Judges.

OPINION

COLE, Circuit Judge. These proceedings involve a final regulation issued by the Environmental Protection Agency (the "EPA") under the Clean Water

Act, 33 U.S.C. § 1251 et seq. The Clean Water Act regulates the discharge of "pollutants" into the nation's waters by, among other things, requiring entities that emit "pollutants" to obtain a National Pollutant Discharge Elimination System ("NPDES") permit. *Id.* §§ 1311(a), 1342. On November 27, 2007, the EPA issued a Final Rule concluding that pesticides applied in accordance with the Federal Insecticide, Fungicide, and Rodenticide Act (the "FIFRA") are exempt from the Clean Water Act's permitting requirements. *See* 71 Fed. Reg. 68,483 (Nov. 27, 2006) (the "Final Rule"). Two different groups of Petitioners—one representing environmental interest groups and the other representing industry interest groups—oppose the EPA's Final Rule as exceeding the EPA's interpretive authority. The EPA defends the Final Rule by arguing that the terms of the Clean Water Act are ambiguous and that the Final Rule is a reasonable construction of the Clean Water Act entitled to deference from this Court. We cannot agree. The Clean Water Act is not ambiguous. Further, it is a fundamental precept of this Court that we interpret unambiguous expressions of Congressional will as written. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Therefore, we hold that the EPA's Final Rule is not a reasonable interpretation of the Act and **VACATE** the Final Rule.

I. BACKGROUND

A. The Regulatory Background

1. The Clean Water Act

Congress enacted the Clean Water Act "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 582 (6th Cir.

1988) (quoting 33 U.S.C. § 1251(a)). The goal of the Clean Water Act is to achieve "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." 33 U.S.C. § 1251(a)(2). Thus, the Act provides that "the discharge of any pollutant by any person shall be unlawful." *Id.* § 1311(a). "Pollutant" is a statutorily defined term that includes, at least, "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." *Id.* § 1362(6). The Supreme Court has held that this list is not exhaustive and that "pollutant" should be interpreted broadly. *Rapanos v. United States*, 547 U.S. 715, 724 (2006).

The Clean Water Act prohibits the discharge of any "pollutant" into navigable waters from any "point source" unless the EPA issues a permit under the NPDES permitting program, 33 U.S.C. §§ 1311(a), 1342, where a "point source" is "any discernible, confined, and discrete conveyance . . . from which pollutants are or may be discharged." *Id.* § 1362(14). The permitting program constitutes an exception to the Clean Water Act's prohibition on pollutant discharges into the Nation's waters. *Id.* §§ 1311(a), 1342; 40 C.F.R. § 122.3. Thus, if a party obtains a permit, the discharge of pollutants in accordance with that permit is not unlawful. *Id.*

Before a permit is issued, the EPA, or a state agency that has been approved by the EPA, evaluates the permit application to ensure that the discharge of a pollutant under the proposed circumstances will not

cause undue harm to the quality of the water. *See* 33 U.S.C. § 1342. In addition to granting permits for specific discharges, the EPA and state authorities may also grant general permits that allow for the discharge of a specific pollutant or type of pollutant across an entire region. *Id.* For example, prior to the EPA's adoption of the Final Rule, the State of Washington had issued a general permit to allow for the application of all aquatic pesticides in the State. *See Acquatechnex v. Washington Dep't of Ecology*, PCHB No. 02-090, 2002 WA ENV LEXIS 87, *2-5 (Pollution Control Hr'gs Bd. Dec. 24, 2002).[1] As a result, users of aquatic pesticides in Washington could discharge those pesticides covered by the rule without obtaining a permit. These general permits "greatly reduce [the] administrative burden by authorizing discharges from a category of point sources within a specified geographic area." *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 108 n.* (2004) (citing 40 C.F.R. § 122.28(b)(2)(v)). "Once [the] EPA or a state agency issues such a [general] permit, covered entities, in some cases, need take no further action to achieve compliance with the NPDES besides adhering to the permit conditions." *Id.*

2. The Federal Insecticide, Fungicide, and Rodenticide Act

The EPA also regulates the labeling and sale of

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[1] The State of California's State Water Resources Control Board (the "Board") also issued a general permit that covered all aquatic pesticide discharges, as long as the discharger certified that alternative options had been evaluated and that any impact the pesticide application had on the water quality would be reported to the Board. General Permit No. CAG990003, 2001 Cal. ENV LEXIS 12, at *1, 3-4, 19-21 (July 19, 2001).

pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act. Under the FIFRA, all pesticides sold in the United States must be registered with the EPA. *See* 7 U.S.C. § 136 et seq. The EPA approves an insecticide for registration only when it finds that the chemical, "when used in accordance with widespread and commonly recognized practice . . .[,] will not generally cause unreasonably adverse effects on the environment." *No Spray Coalition v. City of New York*, 351 F.3d 602, 604-05 (2d Cir. 2003) (quoting 7 U.S.C. § 136a(c)(5)(D)). Under the FIFRA, the EPA issues a "label" for each registered pesticide, indicating the manner in which it may be used; the statute makes it unlawful "to use any pesticide in a manner inconsistent with its labeling." *Id.* (quoting 7 U.S.C. § 136j(a)(2)(6)).

For nearly thirty years prior to the adoption of the Final Rule, pesticide labels issued under the FIFRA were required to contain a notice stating that the pesticide could not be "discharge[d] into lakes, streams, ponds, or public waters unless in accordance with an NPDES permit." EPA's Policy and Criteria Notice 2180.1 (1977). Despite amendments made to the FIFRA's labeling requirements over the years, pesticide labels have always included a notice about the necessity of obtaining an NPDES permit. *See* EPA's Policy and Criteria Notice 2180.1 (1984); Pesticide Registration ("PR") Notice 93-10 (July 29, 1993); PR Notice 95-1 (May 1, 1995); *see also* EPA-738-7-96-007 (Feb. 1996), *available at* http://www.epa.gov/oppsrrd1/REDs/factsheets/3095fact.pdf, (Pesticide Reregistration notification for 4, 4- Dimethyloxazolidine) (referring to the labeling requirement described in the PR Notice).

3. The Regulatory Framework Under the Final Rule

Under the Clean Water Act, pollutants may only be discharged according to a permit unless they fit into one of the exceptions listed in the federal regulations at 40 C.F.R. § 122.3. The Final Rule revises the regulations by adding pesticides to these exceptions as long as they are used in accordance with the FIFRA's requirements. 71 Fed. Reg. at 68,485, 68,492. Specifically, the Final Rule states that pesticides applied consistently with the FIFRA do not require an NPDES permit in the following two circumstances:

> (1) The application of pesticides directly to waters of the United States in order to control pests. Examples of such applications include applications to control mosquito larvae, aquatic weeds, or other pests that are present in waters of the United States.
>
> (2) The application of pesticides to control pests that are present over waters of the United States, including near such waters, where a portion of the pesticides will unavoidably be deposited to waters of the United States in order to target the pests effectively; for example, when insecticides are aerially applied to a forest canopy where waters of the United States may be present below the canopy or where pesticides are applied over or near water for control of adult mosquitoes or other pests.

40. C.F.R. § 122.3(h).

Although the EPA, through its Final Rule, takes the position that pesticides are not generally pollutants, it makes an exception for "pesticide residuals," which "include[] excess amounts of

pesticide." 71 Fed. Reg. at 68,487. "Pesticide residuals" are those portions of the pesticide that "remain in the water after the application and its intended purpose (elimination of targeted pests) have been completed . . . ." *Id.* The EPA concedes that pesticide residue (unlike pesticides generally) *is* a pollutant under the Clean Water Act because it is "waste[] of the pesticide application." *Id.* Nonetheless, the EPA contends that pesticide residue is not subject to the NPDES permitting program because "at the time of discharge to a water of the United States, the material in the discharge must be both a pollutant, and from a point source." *Id.* According to the EPA, the residue cannot be subject to the permitting program because by the time it becomes a pollutant it is no longer from a "point source." Since no "point source" is at play, the EPA reasons, pesticide residue is a "nonpoint source pollutant" and therefore not subject to the permitting requirements. *Id.*

B. Procedural Background

Timely petitions for review of the Final Rule were filed in the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits by either the "Industry Petitioners"[2] or the "Environmental Petitioners."[3] The petitions for

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[2] Agribusiness Association of Iowa, BASF Corporation, Bayer CropScience LP, CropLife America, Delta Council, Eldon C. Stutsman, Inc., FMC Corporation, Illinois Fertilizer & Chemical Association, The National Cotton Council of America, Responsible Industry for a Sound Environment, Southern Crop Production Association, and Syngenta Crop Protection, Inc., LP.

[3] Baykeeper, Californians for Alternatives to Toxics, California Sportfishing Protection Alliance, National Center for Conservation Science and Policy, Oregon Wild, Saint John's

review were consolidated in this circuit by an order of the Judicial Panel on Multidistrict Litigation, under 28 U.S.C. §§ 1407 and 2112(a)(3). The self-titled "Industry Intervenors"[4] filed a motion to intervene in support of the Final Rule.[5]

Environmental Petitioners filed a timely motion to dismiss the petitions because of lack of subject matter jurisdiction or, alternatively, to transfer the cases to the Ninth Circuit. Industry Petitioners, the EPA, and Industry Intervenors opposed this motion. The Environmental Petitioners have also filed a complaint challenging the Final Rule in the Northern District of California in order to preserve review of the Final Rule in the event this Court grants their motion to dismiss. On July 24, 2007, we denied the motion to transfer and deferred the decision on the question of subject matter jurisdiction.

II. JURISDICTION

Environmental Petitioners contend that this dispute should be dismissed for lack of subject matter jurisdiction, arguing that original review of the Final Rule by the courts of appeals is not covered by the grant of original jurisdiction set forth in the Clean Water Act, 33 U.S.C. § 1369(b)(1). Environmental Petitioners are correct that "Congress did not intend court of appeals jurisdiction over all EPA actions taken

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Organic Farm, Waterkeeper Alliance, Inc., Peconic Baykeeper, Inc., Soundkeeper, Inc., Environmental Maine, and Toxics Action Center.

[4] Industry Intervenors include each of the Industry Petitioners listed above as well as American Farm Bureau Federation and American Forest & Paper Association.

[5] American Mosquito Association submitted a brief as amicus curiae in support of the Final Rule.

pursuant to the Act." *Lake Cumberland Trust, Inc. v. EPA*, 954 F.2d 1218, 1222 (6th Cir. 1992) (quoting *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1431 (9th Cir. 1991)). However, we conclude that, at a minimum, § 1369(b)(1)(F) encompasses the action before us.

Under 33 U.S.C. § 1369(b)(1)(F), a party may challenge EPA actions "issuing or denying any permit under [33 U.S.C.] section 1342 . . ." in the appropriate circuit court. The Clean Water Act's permitting program is set forth in § 1342. The jurisdictional grant of § 1369(b)(1)(F) authorizes the courts of appeals "to review the regulations governing the issuance of permits under section 402, 33 U.S.C. § 1342, as well as the issuance or denial of a particular permit." *Am. Mining Cong. v. EPA*, 965 F.2d 759, 763 (9th Cir. 1992). Thus, in *Natural Resources Defense Council, Inc. v. EPA*, 966 F.2d 1292, 1296-97 (9th Cir. 1992), the court held that it had jurisdiction to review an EPA rule exempting uncontaminated storm-water discharge from the permitting regulations. The *Natural Resources* court concluded that it had "the power to review rules that regulate the underlying permit procedures." *Id.* at 1297 (citing *NRDC v. EPA*, 656 F.2d 768, 775 (D.C. Cir. 1981) and *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 136 (1976)). The Final Rule before us today likewise regulates the permitting procedures, and we therefore conclude that jurisdiction is proper under § 1369(b)(1)(F).

III. DISCUSSION

A. Standard of Review

Our review of agency decisions has two components. First, we determine whether the agency's chosen action complies with *Chevron*. 467 U.S. at 842-45; *see United States v. Mead Corp.*, 533 U.S. 218, 227

(2001); *Riverkeeper, Inc. v. EPA* ("*Riverkeeper II*"), 475 F.3d 83, 95 (2d Cir. 2007). When conducting *Chevron* review of the Final Rule, we "examine the [Final Rule] against the statute that contains the EPA's charge." *Riverkeeper, Inc. v. EPA* ("*Riverkeeper I*"), 358 F.3d 174, 183 (2d Cir. 2004). Here, we must determine whether "the intent of Congress is clear as to the precise question at issue." *Nations Bank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995); *Chevron*, 467 U.S. at 842. "In making [this] threshold determination under *Chevron*, a reviewing court should not confine itself to examining a particular statutory provision in isolation. Rather, the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007). If the intent of Congress is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. If, and only if, the statute is silent or ambiguous regarding the question at issue, we then move to step two of *Chevron* review and ask whether "the agency's answer is based on a permissible construction of the statute." *Id.* at 843. If the agency's "interpretation is reasonable, we must defer to its construction of the statute." *Wachovia Bank, N.A. v. Watters*, 431 F.3d 556, 562 (6th Cir. 2005).

The second part of our review would require us to consider the Final Rule under the standards set forth by the Administrative Procedure Act section 10(2)(e), 5 U.S.C. § 706(2) (the "APA"), under which we are required to "hold unlawful and set aside agency action, findings, and conclusions" that, among other criteria,

are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Agency action is arbitrary and capricious where

> the agency has relied on factors that Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency experience.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); *see also Citizens Coal Council*, 447 F.3d at 890. When conducting this form of review, we ensure that the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts and the choice made." *Motor Vehicle Mfrs.*, 463 U.S. at 43. "The court is required to make a 'searching and careful review' in its assessment of the agency action, but 'the ultimate standard of review is a narrow one.'" *Citizens Coal Council*, 447 F.3d at 890 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

B. The Parties' Positions

1. The Petitioners

Environmental Petitioners argue: (1) that the EPA exceeded its authority under the Clean Water Act in issuing a rule that excludes pesticides from the definition of "pollutant" under 33 U.S.C. § 1362(6); (2) that the EPA exceeded its authority under the Clean Water Act when it determined that, while pesticides are discharged by point sources, the residue of these

pesticides is nonetheless a "nonpoint source pollutant"; and (3) that the EPA may not exempt FIFRA-compliant applications of pesticides from the requirements of the Clean Water Act. Industry Petitioners, on the other hand, argue that the Final Rule is arbitrary and capricious because it treats pesticides applied in violation of the FIFRA as pollutants, while it treats the very same pesticides used in compliance with the FIFRA as non-pollutants. In other words, the Industry Petitioners complain that whether something constitutes a pollutant should not hinge upon compliance with the FIFRA.

2. The EPA

As described above, the EPA's Final Rule exempts from the NPDES permitting program pesticides that are applied directly to the Nation's waters, or near such waters, in order to control pests. 40 C.F.R. § 122.3(h). The EPA says that its Final Rule exempts both pesticides generally and "pesticide residue," which includes "excess pesticide." 71 Fed. Reg. at 68,487.

The EPA provides two reasons that its Final Rule is reasonable. First, the EPA argues that the Clean Water Act as it applies to pesticides is ambiguous. The EPA contends that it reasonably determined that pesticides applied according to the FIFRA requirements are not pollutants and therefore are not subject to the NPDES permitting program. The EPA reasons that "Congress defined the term 'pollutant' in the Clean Water Act to mean one of 16 specific items." (EPA Br. at 22.) Of these sixteen, the EPA states that pesticides, which are either chemical or biological in nature, may only be considered to be "chemical wastes" or "biological materials." 71 Fed. Reg. at 68,486. The

EPA argues that pesticides are not "chemical wastes" in the ordinary dictionary definition of the word "waste," because waste is that which is "eliminated or discarded as no longer useful or required after the completion of a process." *Id.* (quoting *The New Oxford American Dictionary* 1905 (Elizabeth J. Jewell & Frank Abate eds., 2001)). Rather than being wastes, the EPA reasons that pesticides applied according to the FIFRA's labeling requirements "are products that the EPA has evaluated and registered for the purpose of controlling target organisms, and are designed, purchased, and applied to perform that purpose." *Id.* The EPA next concludes that pesticides applied in accordance with the FIFRA are not "biological materials" because to find otherwise would lead to the anomalous result "that biological pesticides are pollutants, while chemical pesticides used in the same circumstances are not." *Id.*

The EPA's second argument attempts to justify its Final Rule as applied to pesticide residue. In contrast to pesticides generally, which the EPA contends are *not* pollutants, the EPA concedes that pesticide residue and excess pesticide *are* pollutants within the meaning of the Clean Water Act because "they are wastes of the pesticide application." 71 Fed. Reg. at 68,487. The EPA also concedes that pesticides are discharged from a point source. *Id.* at 68,487-88. Nonetheless, the EPA concludes that no permit is required for pesticide applications that result in excess or residue pesticide because it interprets the Clean Water Act as requiring permits only for discharges that are "both a pollutant, and from a point source" at the time of discharge. *Id.* at 68,487.

C. Analysis

1. Are Pesticides Unambiguously "Pollutants" Within the Meaning of the Act?

The first question under *Chevron* is whether the Clean Water Act unambiguously includes pesticides within its definition of "pollutant." Under this first step, this Court determines "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. This is determined by "employing traditional tools of statutory construction." *Id.* The meaning of a statute "is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *see also Dole v. United Steelworkers of Am.*, 494 U.S. 26, 35 (1990) ("Our 'starting point is the language of the statute,' . . . but 'in expounding a statute, we are not guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'") (citations omitted). If Congress's intent is clear from the statutory language, then "that intent must be given effect." *Chevron*, 467 U.S. at 842-43.

As noted above, the Clean Water Act defines "pollutant" as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). This Court has previously concluded that the "broad generic terms" included in the definition of "pollutant" demonstrate Congress's intent to capture more than just the items expressly enumerated.

United States v. Hamel, 551 F.2d 107, 110 (6th Cir. 1977) (concluding that the Clean Water Act covers, at a minimum, those pollutants covered under the Refuse Act, which applies to "all foreign substances" not explicitly exempted from coverage); *see also, e.g.*, *Cedar Point Oil Co.*, 73 F.3d at 565 ("[T]he breadth of many of the items in the list of 'pollutants' tends to eviscerate any restrictive effect."); *No Spray Coalition, Inc.*, 2005 U.S. Dist. LEXIS 11097, at *17 (citing S. Rep. No. 92-414 at 76 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3742). However, we need not consider the term's breadth today. Rather, we find the plain language of "chemical waste" and "biological materials" in § 1362(b) to be unambiguous as to pesticides. This Court must, therefore, give effect to the Congress's expressed intent. *See Chevron*, 467 U.S. at 842-43.

a. Chemical Waste

Generally, a court should give a word in a statute its "ordinary, contemporary, common meaning, absent an indication Congress intended [it] to bear some different import." *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Attorney*, 369 F.3d 960, 967 (6th Cir. 2004) (quoting *Williams v. Taylor*, 529 U.S. 420, 431-32 (2000)). The EPA refers the Court to *The New Oxford American Dictionary* (Jewell & Abate eds. 2001), which defines waste as "eliminated or discarded as no longer useful or required after the completion of a process." *Id.* at 1905. Industry Petitioners point the Court to *Black's Law Dictionary* (8th ed. 2004), which defines waste as "[r]efuse or superfluous material, esp. that after a manufacturing or chemical process." *Id.* at 1621. Similarly, the Ninth Circuit has accepted the American Heritage

Dictionary's definition of waste as "any useless or worthless byproduct of a process or the like; refuse or excess material." *N. Plains Res. Council v. Fidelity Exploration & Dev. Co.*, 325 F.3d 1155, 1161 (9th Cir. 2003); *Fairhurst v. Hagener*, 422 F.3d 1146, 1149 (2005).

Under any of these definitions of "waste," "chemical waste" for the purposes of the Clean Water Act would include "discarded" chemicals, "superfluous" chemicals, or "refuse or excess" chemicals. As such, under a plain-meaning analysis of the term, we cannot conclude that all chemical pesticides require NPDES permits. Rather, like our sister circuit in *Fairhurst*, we conclude that: so long as the chemical pesticide "is intentionally applied to the water [to perform a particular useful purpose] and leaves no excess portions after performing its intended purpose[] it is not a 'chemical waste,'" 422 F.3d at 1149, and does not require an NPDES permit. *Id.*

On the other hand, as Environmental Petitioners argue and the EPA concedes, excess pesticide and pesticide residue meet the common definition of waste. To this extent, the EPA's Final Rule is in line with the expressed intent of Congress, as the Rule defines these pesticide residues as pollutants "because they are wastes of the pesticide application." 71 Fed. Reg. at 68,487. The EPA aptly states:

> [P]esticides applied to land but later contained in a waste stream, including storm water regulated under the Clean Water Act, could trigger the requirement of obtaining an NPDES permit .... In addition, if there are residual materials resulting from pesticides that remain in the water after the application and its intended purpose has been completed, the residual

> materials are pollutants because they are substances that are no longer useful or required after the completion of a process.

(EPA Br. 29-30.) This Court agrees.

Therefore, at least two easily defined sets of circumstances arise whereby chemical pesticides qualify as pollutants under the Clean Water Act. In the first circumstance, a chemical pesticide is initially applied to land or dispersed in the air—these pesticides are sometimes referred to as either "terrestrial pesticides" or "aerial pesticides" and include applications "above" or "near" waterways. At some point following application, excess pesticide or residual pesticide finds its way into the navigable waters of the United States. Pesticides applied in this way and later affecting the water are necessarily "discarded," "superfluous," or "excess" chemical. Such chemical pesticide residuals meet the Clean Water Act's definition of "chemical waste."

In the second circumstance, a chemical pesticide is applied directly and purposefully to navigable waters to serve a beneficial purpose—such pesticides are often referred to as "aqueous" or "aquatic" pesticides. As contemplated by the EPA, if residual aquatic pesticide "remain[s] in the water after the application and [the pesticide's] intended purpose has been completed," then the residue would likewise qualify as a "chemical waste." (EPA Br. 29-30.) As such, these chemical wastes would unambiguously fall within the ambit of the Clean Water Act.

This second scenario, of course, leads to the inevitable quandary that both nonwaste aqueous pesticide and pesticide residual are applied to water at the same moment, which then gives rise to the question

of how the EPA can regulate and permit the residual. However, this problem is more theoretical than practical. In reality, whether or not a particular chemical pesticide needs to be regulated can be easily answered by both the EPA's and industry's experience with that pesticide. If, as was the case in *Fairhurst*, a chemical such as antimycin leaves no excess portions after performing its intended purpose, then that chemical's use need not be regulated. *See Fairhurst*, 422 F.3d at 1149. If, on the other hand, a chemical pesticide is known to have lasting effects beyond the pesticide's intended object, then its use must be regulated under the Clean Water Act. *See also Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 532-33 (9th Cir. 2001).

b. Biological Materials

Continuing our review under Chevron, we must examine the "ordinary, contemporary, [and] common meaning" of "biological materials." *Grand Traverse Band*, 369 F.3d at 967. Environmental Petitioners point out that *Webster's Third New International Dictionary* (Gove ed. 1993) defines "material" as "of, relating to, or consisting of matter" and "the basic matter from which the whole or the great part of something is made." *Id.* at 1392. The *Oxford English Dictionary* provides that "material" is "that which constitutes the substance of a thing (physical or nonphysical); a physical substance; a material thing." OED Online, *available at* http://dictionary.oed.com/cgi/entry/00303279?query_type=word&queryword=material&first=1&max_to_show=10&sort_type=alpha&result_place=1&search_id=VoPl-c VwRjA-12823&hilite=00303279. The plain, unambiguous nature of this language compels this Court to find that matter of a

biological nature, such as biological pesticides, qualifies as a biological material and falls under the Clean Water Act if it is "discharged into water." 33 U.S.C. § 1362(6).

The EPA points to Ninth Circuit case law that holds that "mussel shells and mussel byproduct are not pollutants" under the Clean Water Act. *Ass'n to Protect Hammersley, Eld & Totten Inlets v. Taylor*, 299 F.3d 1007, 1016 (9th Cir. 2002). The *Hammersley* court found the Clean Water Act to be "ambiguous on whether 'biological materials' means *all* biological matter regardless of quantum and nature." *Id.* While that case is distinguishable, we choose a more limited analysis.[6] We see our obligation not as defining the outermost bounds of "biological materials," but rather simply as deciding whether biological pesticides fit into the ordinary meaning of "biological materials."

The term "biological materials" cannot be read to exclude biological pesticides or their residuals. The EPA's Final Rule treats biological pesticides no differently from chemical pesticides, exempting both from NPDES permitting requirements in certain circumstances. *See* 71 Fed. Reg. at 68,492. We find this interpretation to be contrary to the plain meaning of the Clean Water Act. In 33 U.S.C. § 1362, Congress purposefully included the term "biological materials," rather than a more limited term such as "biological wastes." Congress could easily have drafted the list of pollutants in the Clean Water Act to include "chemical wastes" and "biological wastes." But, here, the word

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[6] The *Hammersley* court based its conclusion on the fact that shells and shell byproduct of shellfish-farming facilities are the result of natural biological processes, not the result of a transforming human process. *See Hammersley*, 299 F.3d at 1016-17.

"waste" does not accompany "biological materials." Thus, if we are to give meaning to the word "waste" in "chemical waste," we must recognize Congress's intent to treat biological and chemical pesticides differently.

This interpretation is consistent with the precedent of this Court and others. In *National Wildlife Federation v. Consumer Power Co.*, 862 F.2d 580 (6th Cir. 1988), we determined that "[m]illions of pounds of live fish, dead fish and fish remains annually discharged in Lake Michigan by [a] facility are pollutants within the meaning of the [Clean Water Act], since they are "biological materials." Likewise, the District Court of Maine determined that "salmon feces and urine that exit the net pens and enter the waters are pollutants as they constitute 'biological materials' or 'agricultural wastes.'" *United States Pub. Interest Research Group v. Atl. Salmon of Maine*, 215 F. Supp. 2d 239, 247 (D. Me. 2002) (citing *Higbee v. Starr*, 598 F. Supp. 323, 330-31 (D. Ark. 1984) *aff'd*, 782 F.2d 1048 (8th Cir. 1985)). Biological pesticides similarly must be considered "biological materials." Biological pesticides consist of artificial concentrations of viruses, bacteria, fungi, plant materials, and/or other biological materials. *See* Pesticides: Glossary, U.S. EPA, *available at* http://www.epa.gov/pesticides/glossary. Congress defined "pollution" as "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. § 1362(19). Adding biological pesticides to water undeniably alters its biological integrity. Therefore, we find biological pesticides to be "biological materials" under the Clean Water Act.

2. Are Chemical Pesticide Residuals Added to the Water by "Point Sources?"[7]

The EPA further defends its Final Rule by arguing that excess pesticide and residue pesticide are not discharged from a "point source." In other words, though excess and residue pesticides have exactly the same chemical composition and are discharged from the same point source at exactly the same time as the original pesticide, and though excess and residue pesticides would not enter the Nation's waterways but for the discharge of the original pesticide, the EPA concludes that excess and residue pesticides are not discharged from a "point source" because at the moment of discharge there is only pesticide. This is so, according to the EPA, because excess and residue pesticides do not exist until after the discharge is complete, and therefore "should be treated as a nonpoint source pollutant." 71 Fed. Reg. at 65,847.

The Clean Water Act defines "point source" as "any discernible, confined, and discrete conveyance," including a variety of mechanisms such as "container," "rolling stock," or "vessel or other floating craft." 33 U.S.C. § 1362(14). The EPA and the courts agree that pesticides are applied by point sources. *See* 71 Fed. Reg. at 65,847; *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1185 (9th Cir. 2002); *Headwaters*, 243 F.3d at 528. The EPA argues that, at the time of discharge, the pesticide is a nonpollutant, and the excess pesticide and pesticide residues are not

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[7] This analysis is not necessary for biological pesticides because, as discussed above, both biological pesticides and their residuals are pollutants under the Clean Water Act. Because biological pesticides are discharged from a "point source" they must be regulated under the Act.

created until later, presumably after they are already in the water. Therefore, according to the EPA, pesticides at the time of discharge do not require permits because they are not yet excess pesticides or residue pesticides. But there is no requirement that the discharged chemical, or other substance, immediately cause harm to be considered as coming from a "point source." Rather, the requirement is that the discharge come from a "discernible, confined, and discrete conveyance," 33 U.S.C. § 1362(14), which is the case for pesticide applications.

The EPA offers no direct support for its assertion that a pesticide must be "excess" or "residue" at the *time of discharge* if it is to be considered as discharged *from* a "*point source*." This omission of authority is understandable, as none exists. The Clean Water Act does not create such a requirement. Instead, it defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The EPA's attempt at temporally tying the "addition" (or "discharge") of the pollutant to the "point source" does not follow the plain language of the Clean Water Act. Injecting a temporal requirement to the "discharge of a pollutant" is not only unsupported by the Act, but it is also contrary to the purpose of the permitting program, which is "to prevent harmful discharges into the Nation's waters." *Defenders of Wildlife*, 127 S. Ct. at 2525. If the EPA's interpretation were allowed to stand, discharges that are innocuous at the time they are made but extremely harmful at a later point would not be subject to the permitting program. Further, the EPA's interpretation ignores the directive given to it by Congress in the Clean Water Act, which is to protect

water quality. As the EPA itself recognizes, "Congress generally intended that pollutants be controlled at the source whenever possible." 73 Fed. Reg. at 33,702 (citing S. Rep. No. 92-414, p. 77 (1972)). Here, it is certainly possible for pesticide residue to be controlled at its source because the discharge of the pesticide introduces such residue into the water.

The EPA's newly asserted temporal element also runs contrary to its own recent interpretation of the Clean Water Act's term "addition." *See* 73 Fed Reg. 33,697 (June 13, 2008). The EPA determined that transfers of water from one body of water to another do not constitute the "addition" of a pollutant to the new body of water, and in doing so clarified its understanding of the term "addition." 73 Fed Reg. 33,697. The EPA explained:

> Given the broad definition of "pollutant," transferred (and receiving) water will always contain intrinsic pollutants, but the pollutants in transferred water are already *in* "the waters of the United States" before, during, and after the water transfer. Thus, there is no "addition"; nothing is being added "to" "the waters of the United States" by virtue of the water transfer, because the pollutant at issue is already part of "the waters of the United States" to begin with.
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> . . . .
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> As noted above, EPA's longstanding position is that an NPDES pollutant is "added" when it is introduced into a water from the "outside world" by a point source. *Gorsuch*, 693 F.2d at 174-75.

Id. at 33,701. Given the EPA's understanding of "addition" of a pollutant as stated above, it is clear that under the meaning of the Clean Water Act, pesticide

residue or excess pesticide—even if treated as distinct from pesticide—is a pollutant discharged from a point source because the pollutant is "introduced into a water from the 'outside world' by" the pesticide applicator from a "point source." *See id.* This interpretation coincides with the method of determining whether a discharge is from a "point source" that the Supreme Court recently cited with approval: "For an addition of pollutants to be from a point source, the relevant inquiry is whether—but for the point source—the pollutants would have been added to the receiving body of water." *Miccosukee*, 541 U.S. at 103 (quoting *Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 280 F.3d 1364, 1368 (11th Cir. 2002)). It is clear that but for the application of the pesticide, the pesticide residue and excess pesticide would not be added to the water; therefore, the pesticide residue and excess pesticide are from a "point source."

3. May the Final Rule Stand?

For all of these reasons, we conclude that the statutory text of the Clean Water Act forecloses the EPA's Final Rule. The EPA properly argues that excess chemical pesticides and chemical pesticide residues, rather than all chemical pesticides, are pollutants. However, the Final Rule does not account for the differences between chemical and biological pesticides under the language of the Clean Water Act. Further, because the Act provides that residual and excess chemical pesticides are added to the water by a "point source" there is no room for the EPA's argument that residual and excess pesticides do not require an NPDES permit. The "point source" from which the residue originates is easily discernable and

necessarily must "be controlled at the source." *See* 73 Fed. Reg. at 33,702. Given all of the above in combination with the EPA's interpretation that "[p]oint sources need only convey pollutants into navigable waters to be subject to the Act," *id.* at 33,703, dischargers of pesticide pollutants are subject to the NDPES permitting program in the Clean Water Act. As such, the EPA's Final Rule cannot stand. Because the Clean Water Act's text bars the Final Rule we make no determination regarding the validity of the issuance of the Final Rule under the APA, nor do we analyze the relationship between the Clean Water Act and the FIFRA.

CONCLUSION

For the foregoing reasons, Environmental Petitioners' petitions are **GRANTED** in part and **DENIED** in part, and Industry Petitioners' petitions are **DENIED** in whole. We **VACATE** the Final Rule.

[68483]
Federal Register/Vol. 71, No. 227/
Monday, November 27, 2006/Rules and Regulations

ENVIRONMENTAL PROTECTION AGENCY
40 CFR Part 122
[OW–2003–0063; FRL–8248–1]
RIN 2040–AE79

Application of Pesticides to Waters of the United States in Compliance With FIFRA
AGENCY: Environmental Protection Agency (EPA).
ACTION: Final rule.

SUMMARY: Today, EPA is issuing a regulation stating that the application of a pesticide in compliance with relevant requirements of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) does not require a National Pollutant Discharge Elimination System (NPDES) permit in two specific circumstances. The first circumstance is when the application of the pesticide is made directly to waters of the United States to control pests that are present in the water. The second circumstance is when the application of the pesticide is made to control pests that are over, including near, waters of the United States. This rulemaking is based on the Agency's interpretation of the definition of the term "pollutant" under the Clean Water Act (CWA) as not including such pesticides.

This final rulemaking replaces EPA's previously published Interim and Final Interpretive Statements on the Application of Pesticides to Waters of the United States in Compliance with FIFRA. EPA's Interpretive Statement, published February 1, 2005, described the Agency's interpretation of the CWA with

regard to the application of pesticides regulated under FIFRA that are applied to or over, including near, waters of the United States. On August 13, 2003, EPA provided public notice of and solicited public comment on an Interim Statement and incorporated that input into the Interpretive Statement. On February 1, 2005, EPA published the Interpretive Statement and proposed to codify its substance in EPA's NPDES regulations and solicited comment on that proposed action. Today's final rule is the result of this process.

DATES: These final regulations are effective on January 26, 2006.

ADDRESSES: EPA has established a docket for this action under Docket ID No. OW–2003–0063. All documents in the docket are listed online at http://www.regulations.gov. Although listed in the online docket, some information is not publicly available, i.e., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either online or in hard copy at the Water Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Water Docket is (202) 566–2426.

FOR FURTHER INFORMATION CONTACT: For additional information, contact Jeremy Arling, Water Permits Division, Office of Wastewater Management (4203M), Environmental Protection Agency, 1200

Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 202–564– 2218, e-mail address: arling.jeremy@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

You may be affected by this action if you apply pesticides to or over, including near, water. Potentially affected entities may include, but are not limited to:

[Table 1. omitted]

[68484] This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. This table lists the types of entities that EPA is now aware could potentially be affected by this action. Other types of entities not listed in the table could also be affected. To determine whether your facility is affected by this action, you should carefully examine the applicability criteria in 40 CFR 122.23. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

II. Background

A. Clean Water Act and the Federal Insecticide, Fungicide, and Rodenticide Act

Congress passed the Federal Water Pollution Control Act (1972), also known as the Clean Water Act (CWA), to "restore and maintain the chemical, physical, and biological integrity of the nation's waters" 33 U.S.C. 1251(a). The CWA prohibits the discharge of any pollutant by any person from a point source into a water of the United States, except in compliance with

certain other provisions of the Act, including Section 402. 33 U.S.C. 1311(a). Section 402 in turn authorizes EPA to issue permits under the National Pollutant Discharge Elimination System (NPDES) permit program for such discharges. States may also issue NPDES permits if authorized to do so by EPA. 33 U.S.C. 1342(a) and (b).

NPDES permits under the CWA are required only for point source discharges of materials that are *pollutants* to waters of the United States. Section 502(6) of the CWA defines "pollutant" to mean:

* * * dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water.

33 U.S.C. 1362(6).[1] In the more than 30 years that EPA has administered the CWA, the Agency has never issued an NPDES permit for the application of a pesticide to or over water to target a pest that is present in or over the water. Nor has the Agency ever stated in any general policy or guidance that an NPDES permit is required for such applications.

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[1] The remaining language of the definition of "pollutant" in Section 502(6) is as follows, and is not relevant to today's action: "The term does not mean (A) "sewage from vessels" within the meaning of Section 312 of this Act; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources."

EPA regulates the sale, distribution and use of pesticides in the United States under the statutory framework of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) to ensure that when used in conformance with FIFRA labeling directions, pesticides will not pose unreasonable risks to human health and the environment. All new pesticides must undergo a rigorous registration procedure under FIFRA during which EPA assesses a variety of potential human health and environmental effects associated with use of the product.

Under FIFRA, EPA is required to consider the effects of pesticides on the environment by determining, among [68485] other things, whether a pesticide "will perform its intended function without unreasonable adverse effects on the environment," and whether "when used in accordance with widespread and commonly recognized practice [the pesticide] will not generally cause unreasonable adverse effects on the environment." 7 U.S.C. 136a(c)(5). In performing this analysis, EPA examines the ingredients of a pesticide, the intended type of application site and directions for use, and supporting scientific studies for human health and environmental effects and exposures. The applicant for registration of the pesticide must provide data from tests done according to EPA guidelines. This process is discussed in more detail below.

Several courts have recently addressed the question of whether the CWA requires NPDES permits for pesticide applications. These cases have resulted in some confusion among the regulated community and other affected citizens about the applicability of the CWA to pesticides applied to

waters of the United States. In 2001, the U.S. Court of Appeals for the Ninth Circuit held in *Headwaters, Inc.* v. T*alent Irrigation District* (*Talent*) that an applicator of herbicides was required to obtain an NPDES permit under the circumstances before the court (described in detail in Section V.C. below). 243 F.3rd 526 (9th Cir. 2001). The *Talent* decision caused considerable concern and confusion among public health authorities, natural resource managers, and others who rely on pesticides regarding their potential obligation to obtain an NPDES permit when applying a pesticide consistent with FIFRA and particularly about the impact of such a requirement on accomplishing their mission of protecting human health and the environment.

In 2002, the Ninth Circuit in *League of Wilderness Defenders et al. v. Forsgren* (*Forsgren*) held that the application of pesticides to control gypsy moths in National Forest lands required an NPDES permit. 309 F.3d 1181 (9th Cir. 2002). The court in Forsgren did not analyze the question of whether the pesticides applied were pollutants, because it assumed that the parties agreed that they were. In fact, the United States expressly reserved its arguments on that issue in its brief to the District Court. Id. at 1184, n.2. The court instead analyzed the question of whether the aerial application of the pesticide constituted a point source discharge, and concluded that it did. Id. at 1185.

Since *Talent and Forsgren*, California, Nevada, Oregon, and Washington, all of which are within the Ninth Circuit, have issued permits for the application of certain types of pesticides (e.g., products to control aquatic weeds and algae and products to control mosquito larvae). Other States have continued their longstanding practice of not issuing permits to people

who apply pesticides to waters of the United States. These varying practices reflect the substantial uncertainty among regulators, the regulated community, and the public regarding how the Clean Water Act applies to pesticides that have been properly applied and used for their intended purpose. The Ninth Circuit recently addressed the Clean Water Act's applicability to pesticide applications for a third time. In *Fairhurst* v. *Hagener*, the court held that pesticides applied directly to a lake in order to eliminate non-native fish species, where there are no residues or unintended effects, are not "pollutants" under the CWA because they are not chemical wastes. 422 F.3d 1146 (9th Cir. 2005).

Since *Talent* and *Forsgren*, other courts have addressed the applicability of the CWA's NPDES permit requirements to pesticide applications. In *Altman* v. *Town of Amherst (Altman)*, the Second Circuit vacated and remanded for further development of the record a District Court decision holding that the Town of Amherst was not required to obtain an NPDES permit to spray mosquitocides over waters of the United States. 47 Fed. Appx. 62, 67 (2nd Cir. 2002). The United States filed an amicus brief setting forth the Agency's views in the context of that particular case. In its opinion, the Second Circuit stated that "[u]ntil the EPA articulates a clear interpretation of current law—among other things, whether properly used pesticides released into or over waters of the United States can trigger the requirement for NPDES permits * * *—the question of whether properly used pesticides can become pollutants that violate the CWA will remain open." *Id.* at 67.

B. Interim and Interpretive Statements

In August 2003, EPA first analyzed the applicability of the NPDES permit program to pesticide applications in an administrative context through an Interim Statement and Guidance. 68 FR 48385 (Aug. 13, 2003). The Interim Statement presented EPA's position on the two circumstances in which pesticides applied to waters of the United States consistent with all relevant requirements of FIFRA are not "pollutants" under the CWA and thus do not require an NPDES permit. Although the United States previously addressed issues related to the Interim Statement in several *amicus* briefs, including those filed in *Talent* and *Altman*, those briefs reflected the government's evaluation of the law in the context of specific factual situations, and did not result from deliberative consideration through an administrative process. As such, the amicus briefs did not represent EPA's legal position on the precise questions at issue in the Interim Statement or in today's regulation.

EPA solicited public comments on its interpretation of the term "pollutant" in the Interim Statement as it relates to certain pesticide applications. After considering the public comments, EPA issued a final Interpretive Statement on January 25, 2005. EPA simultaneously published a notice of proposed rulemaking to incorporate the substance of the Interpretive Statement into EPA regulations and solicited public comment on the proposed rulemaking. 70 FR 5093 (Feb.1, 2005). EPA has considered the comments received and is today taking final action on the proposed regulation. The final regulation is

substantially similar to the proposed regulations, with certain modifications described below.[2]

III. Summary of the Final Rule

EPA is revising the NPDES permit program regulations to add a paragraph to the list of discharges in 40 CFR 122.3 that are excluded from NPDES permit requirements. Specifically, today's regulation excludes applications of pesticides to waters of the United States consistent with all relevant requirements under FIFRA in two specific circumstances as follows:

(1) The application of pesticides directly to waters of the United States in order to control pests. Examples of such applications include applications to control mosquito larvae,

aquatic weeds, or other pests that are present in waters of the United States.

(2) The application of pesticides to control pests that are present over waters of the United States, including near such waters, where a portion of the pesticides will unavoidably be deposited to waters of the United States in order to target the pests effectively; for example, when insecticides are aerially applied to a forest canopy where **[68486]** waters of the United States may be present below the canopy or when pesticides are applied over or near water for control of adult mosquitoes or other pests.

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[2] On March 29, 2002, EPA issued an Interpretive Statement and Regional Guidance on the Clean Water Act's Exemption for Return Flows from Irrigated Agriculture, which clarified that the application of an aquatic herbicide consistent with the FIFRA labeling to ensure the passage of irrigation return flow is a nonpoint source activity not subject to NPDES permit requirements under the Clean Water Act. This regulation does not address the March 2002 guidance.

Pesticides applied under these circumstances are not pollutants and therefore are not subject to NPDES permitting requirements.

EPA's final rule is substantially similar to the rule proposed in February 2005. EPA has modified the proposed regulatory text only to clarify the types of pesticide applications covered in the second circumstance (those to control pests present over, including near, waters of the United States). Commenters raised concerns that the second circumstance, as written in the proposed rule, could be interpreted more broadly than the Agency intended (e.g. encompassing drift from terrestrial pesticide applications). The final rule clarifies that the applications in the second circumstance are those in which it is unavoidable that some of the pesticides will be deposited into water in order to effectively target the pests. In other words, EPA is clarifying in the final rule that the regulation encompasses only those applications to control pests over, including near, waters of the United States, where the pesticide necessarily must enter the water in order for the application to achieve its intended purpose. Thus, the applications must first be intended to control pests over (including near) a water of the United States. Second, it must be unavoidable that the pesticide enter the water in order to target such pests effectively. For example, EPA believes that wide-area forest canopy insecticide applications can result in deposition to streams and other waters of the U.S. which are either not visible to the aerial applicator or not possible to avoid given the location of aerial application, and that in such circumstances, it is unavoidable that the pesticide enter the water in order to effectively target

pests living in the canopy. Likewise, mosquito adulticide applications can result in some pesticide product entering the water because adult mosquitoes generally live over and adjacent to waterbodies. Similarly, pesticide applications to control non-native plants which grow at the water's edge, such as purple loosestrife, are intended to be covered by this provision, because when targeting plants at the water's edge, it is unavoidable that some of the herbicide will enter the water. EPA notes that the clarifying language in § 122.3(h)(2) is not intended to impose any additional requirements on pesticide applications beyond relevant FIFRA requirements. In addition, it is not intended to address applications of pesticides to terrestrial agricultural crops.

IV. Discussion

Today's rulemaking implements EPA's interpretation of the CWA's definition of "pollutant" with respect to certain applications of pesticides. Under the CWA, pollutant means:

* * * dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. 33 U.S.C. 1362(6).

The circumstances of pesticide applications covered under today's rule are limited to the two types of applications described above, when conducted in compliance with all relevant requirements of FIFRA. EPA considers "relevant requirements" of FIFRA to mean those FIFRA requirements that relate to water quality. For instance, violating a requirement that the person mixing the pesticide must wear protective

clothing, while an unlawful act that can be enforced under FIFRA, is not related to the protection of water quality, and therefore not a relevant FIFRA requirement for purposes of today's regulation. However, a labeling provision that governs application rates, active ingredient concentrations and dilution requirements, buffer zones, application locations, intended targets, times of day, temperature or other application requirements, and thus concerns the amounts, concentrations, and viability of substances that may potentially end up in waters of the United States, is related to water quality. Relevant FIFRA requirements may appear in product labeling, FIFRA regulation, or other documents setting forth requirements applied pursuant to FIFRA.

The application of a pesticide from a point source to waters of the United States requires an NPDES permit only if it constitutes the discharge of a "pollutant" within the meaning of that term in the CWA. EPA has evaluated whether pesticides regulated under and applied consistent with relevant FIFRA requirements for the two circumstances previously described fall within the terms in the CWA's definition of "pollutant," and concludes that they do not. Pesticides are not dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt or industrial, municipal, and agricultural waste. See CWA section 502(6). In addition, as described below, the terms, "chemical waste" and "biological materials," also do not encompass the types of pesticide applications addressed in today's action.

First, such pesticides are not "chemical wastes." The term "waste" ordinarily means that which is "eliminated or discarded as no longer useful or required after the completion of a process." The New Oxford American Dictionary 1905 (Elizabeth J. Jewell & Frank Abate eds., 2001). Pesticides applied consistent with relevant FIFRA requirements are not "wastes" as that term is commonly defined—on the contrary, they are products that EPA has evaluated and registered for the purpose of controlling target organisms, and are designed, purchased, and applied to perform that purpose. See *Fairhurst* v. *Hagener*, 422 F.3d at 1150.

EPA also interprets the term "biological materials" not to include biological pesticides applied consistent with relevant FIFRA requirements. This interpretation is both reasonable and consistent with Congressional intent, and is supported by relevant case law. It is unlikely that Congress intended to include biological pesticides applied in the circumstances described in today's rule within the Clean Water Act's definition of "pollutant." To do so would mean that biological pesticides are pollutants, while chemical pesticides used in the same circumstances are not. Since biologically and chemically based pesticides applied consistent with relevant requirements adopted by EPA under FIFRA are both EPA-evaluated products, treating them differently under the Clean Water Act is not warranted. Moreover, at the time the Act was adopted in 1972, chemical pesticides were predominant. It is therefore not surprising that Congress failed to discuss whether biological pesticides were to be covered by the Act. The fact that more biological pesticides have been developed since passage

of the Act in 1972 does not justify expanding the reach of the NPDES permit requirement when there is no evidence that Congress intended the CWA to regulate biological pesticides in a manner different from chemical pesticides. Finally, biological pesticides in use today are generally reduced-risk products that have a narrower range of potential adverse environmental effects compared to many chemical pesticides. For this reason it would not make sense, and would be inconsistent with the goals of the Clean Water Act, to discourage the [68487] use of biological pesticides by requiring applicators of these products to obtain an NPDES permit when chemical pesticides have no such requirement.

In cases in which courts have found specific biological materials to be "pollutants" under section 502(6) the substances at issue were waste materials discharged from a point source. See *Concerned Area Residents for the Environment* v. *Southview Farm*, 34 F.3d 114 (2d Cir. 1994) (liquid manure is solid waste, sewage, biological material, and agricultural waste and is therefore a pollutant); *USPIRG* v. *Atlantic Salmon*, 215 F.Supp. 2d 239, 247–49 (D. Maine 2002) (non-native fish escaped from net pens and salmon feces and urine exiting net pens are biological materials; pharmaceuticals in excess salmon feed exiting net pens are chemical wastes), *National Wildlife Federation* v. *Consumers Power Co.*, 862 F.2d 580, 585 (6th Cir. 1988) (live fish, dead fish, and fish remains released from hydro-electric facility's turbine are biological materials), *U.S.* v. *Plaza Health Laboratories, Inc.*, 3 F.3d 643, 646 (2d Cir. 1993), *cert. denied* 114 S.Ct. 2764 (1994) (discarded vials of human blood are pollutants). In none of these cases, which were cited by

commenters, did a court find that a product applied for its intended purpose consistent with applicable EPA requirements was a "biological material" and therefore a pollutant under the CWA.

The Ninth Circuit Court of Appeals in *Assn. to Protect Hammersley, Eld, and Totten Inlets (APHETI)* v. *Taylor Resources, Inc.*, 299 F.3d 1007, 1017 (9th Cir. 2002), cited to several of these cases as being in accord with its finding that "biological materials" means the waste product of a human or industrial process. The APHETI court based its decision that mussel shells, mussel feces, and other materials emitted from mussels grown on harvesting rafts are not pollutants on the doctrine of *ejusdem generis*. The court found that the more specific terms in the CWA's definition of "pollutant" support an understanding of the more general term "biological materials" as waste material of a human or industrial process. *Id.* at 1015. The court went on to analyze ongress' intent in enacting the CWA and found that the purpose of the statute further supported such an interpretation of biological materials in that case. *Id.* at 1016.

Furthermore, EPA's interpretation that biological and chemical pesticides are not pollutants is reasonable because both types of pesticides must comply with FIFRA registration requirements. EPA reviews and evaluates these pesticides and authorizes their use, subject to the limitations and requirements of the EPA registration.

Today's action applies only to the specific categories of pesticide applications addressed in the text of the regulation. EPA notes that pesticides are waste materials, and therefore pollutants under the Act,

when contained in a waste stream, including storm water regulated under section 402(p) or other industrial or municipal discharges. In those circumstances, an NPDES permit may be required if the pesticides are discharged into a water of the United States from a point source.

In addition, if there are residual materials resulting from pesticides that remain in the water after the application and its intended purpose (elimination of targeted pests) have been completed, these residual materials are also pollutants under CWA section 502(6) because they are wastes of the pesticide application. Such residuals include excess amounts of pesticide that do not reach a target organism and materials that remain after the application has completed its intended task. These materials are waste materials, as that term is commonly defined, because they are substances that are "no longer useful or required after the completion of a process." The New Oxford American Dictionary 1905, supra. See also *Fairhurst* v. *Hagener*, 422 F.3d 1146.

However, pesticide applications under the circumstances described above and consistent with FIFRA do not require NPDES permits, even if the application leaves residual materials which are "pollutants" under the Act in waters of the United States. Section 301(a) of the CWA prohibits the "discharge of any pollutant" except in compliance with certain other provisions of the Act. The CWA defines "discharge of a pollutant" to mean "any *addition* of any pollutant to navigable waters from *any point source*." Thus, at the time of discharge to a water of the United States, the material in the discharge must be both a pollutant, and from a point source. In this case, while

the discharge of the pesticide is from a point source (generally a hose or an airplane), it is not a pollutant at the time of the discharge. The material added by a pesticide applicator to or over, including near, water is not a pollutant for the reasons stated above. Even though the pesticide may become a "pollutant" at a later time (*e.g.*, after the pesticide product has served its intended purpose), a permit is not required for its application because it did not meet both statutory prerequisites (pollutant and point source) at the time of its discharge into the water. Instead, the residual should be treated as a nonpoint source pollutant, potentially subject to CWA programs other than the NPDES permit program (*e.g.*, listing and TMDL development pursuant to CWA section 303(d)).

Today's action does not address drift over and into waters of the United States from pesticide applications to land. As discussed below, EPA has established a multi-stakeholder workgroup under one of its federal advisory committees to explore policy issues relating to the terrestrial application of pesticides that may drift into aquatic environments. EPA also notes that today's discussion of the terms "chemical waste" and "biological materials" applies only for CWA purposes and is not intended to address the use of those terms or similar terms under any other statutes the Agency administers.

V. Public Comment

EPA first solicited comment on its interpretation of "pollutant" under the CWA with respect to certain pesticide applications on August 13, 2003. See 68 FR 48385 (Aug. 13, 2003). EPA provided a second opportunity for public comment on its interpretation when it proposed the regulation on which the Agency is

today taking final action. See 70 FR 5093 (Feb. 1, 2005). EPA received many comments on its interpretation during both comment periods, from a wide range of interested parties including pesticide manufacturers and applicators, public health control agencies, State agricultural agencies, State environmental agencies, environmental groups, human health advocates, farming interests, and other members of the public. Many commenters supported EPA's interpretation, while others opposed it as inconsistent with the CWA.

The record for today's action contains EPA's detailed responses to comments received during both public comment periods. See Docket ID No. OW–2003–0063 at *http://www.regulations.gov.* EPA is providing a summary below of its responses to some of the significant comments received.

A. Scope of Regulation

Many of the commenters who supported EPA's proposed rule also recommended that EPA broaden the scope of the final rule to cover all pesticide applications, including agricultural applications over land, that are conducted in accordance with the relevant requirements of FIFRA. This final rule addresses only the following two circumstances described in the proposed rule: The application of [68488] aquatic pesticides directly to waters of the United States, and the application of pesticides to control pests over, including near, such waters.

In the meantime, EPA will continue to follow its long-standing practice of not requiring NPDES permits for agricultural pesticide applications that are conducted in compliance with relevant FIFRA requirements. EPA is continuing to consider the

applicability of the CWA to situations other than those EPA is addressing in today's action where pesticides applied in accordance with relevant FIFRA requirements may reach and enter waters of the United States, including drift of pesticides applied aerially over land. Therefore, EPA does not believe it is appropriate to broaden the scope of the regulation to include additional types of pesticide applications at this time.

To assist the Agency's consideration of these issues, EPA has established a workgroup under the existing Pesticide Program Dialogue Committee (PPDC) (an advisory committee chartered under the Federal Advisory Committee Act (FACA)) to address issues involving pesticide spray drift from agricultural and other applications. The goals of the workgroup are the following: (1) Improving understanding of the perspectives of all stakeholders regarding pesticide spray drift; (2) finding common ground for further work toward minimizing both the occurrence and potential adverse effects of pesticide spray drift; (3) developing options for undertaking work where common ground exists; and (4) exploring the extent of drift, even with proper usage, and the range and effectiveness of potential responses to unacceptable levels of off-target drift. The spray drift workgroup will provide advice to EPA through the PPDC.

The PPDC is a FACA-authorized forum for a diverse group of stakeholders to provide feedback to the Agency's pesticide program on various pesticide regulatory, policy, and program implementation issues. Topics of discussion at past meetings have included the disclosure of inert ingredients, registration review, nonanimal testing, antimicrobial pesticides,

endangered species, reduced risk pesticides, labeling, minor uses, ecological standards, fees for service, experimental use permits, environmental marketing claims, outreach to the public, and several implementation issues emanating from the Food Quality Protection Act of 1996.

Members of the PPDC include representatives of environmental and public interest groups, pesticide manufacturers and trade associations, user and commodity groups, public health and academic institutions, federal and State agencies, and the general public. Participants in the Spray Drift workgroup reflect the range of stakeholder interests represented on the full PPDC, and also include members with backgrounds in water quality issues. By operating under the PPDC, the Spray Drift workgroup will comply with FACA procedural requirements including timely public notice of meetings, public access to meetings and opportunity for the public to comment; public availability of documents considered by the workgroup; and attendance of a federal officer or employee at each meeting.

B. Sufficiency of FIFRA to Address Water Quality Impacts of Pesticide Applications

Many commenters objected to the proposed rule on the basis that EPA's regulation of pesticides under FIFRA does not adequately protect water quality, and thus pesticide applications should require an NPDES permit. These commenters alleged both legal and policy shortcomings of FIFRA. They also asserted that EPA's interpretation is improper because FIFRA does not preempt CWA requirements and because EPA lacks authority to exempt categories of

discharges from the CWA's prohibition against discharges without an NPDES permit.

These commenters may have misinterpreted the legal interpretation that provides the basis for today's action. First, EPA is not expressly or by implication repealing any provision of the CWA in today's action, nor is the Agency arguing that FIFRA registration preempts CWA section 301(a) or section 402(a). Moreover, EPA is not arguing that registration under FIFRA or compliance with FIFRA requirements replaces or satisfies an otherwise applicable requirement under the CWA to obtain an NPDES permit. Nor is EPA exempting from section 301(a) or section 402(a) any categories of pollutants, because the pesticide applications at issue here are not pollutants under the Act. The proscription in the CWA against discharging pollutants from point sources to waters of the United States except in compliance with section 402 continues to apply. Rather, EPA is exercising its authority to interpret a term in a statute it administers. EPA is clarifying that pesticides applied to or over, including near, water for their intended purpose consistent with all relevant requirements under FIFRA in the circumstances specified in the rule are not, at the time of application, "pollutants" under the CWA, and therefore applications are not discharges required to obtain permits.

EPA's review, evaluation, and registration of pesticides used in these two circumstances further demonstrate that this is a reasonable interpretation, consistent with Congressional intent. EPA's regulatory programs under FIFRA provide support for the Agency's conclusion that the pesticides applied to or over, including near, water are not wastes (and

therefore not pollutants) and serve as an indicator of when a pesticide is being applied as a product for its intended, beneficial purpose. Under FIFRA, EPA receives applications from people who wish to sell and distribute pesticides. The Agency may approve and issue a registration for a product if EPA determines that the product will not cause "unreasonable adverse effects on the environment," which is defined as "any unreasonable risk to man or the environment, taking into account the economic, social and environmental costs and benefits of the use of [a] pesticide * * *." FIFRA Section 3(c)(5). In other words, the Agency may register a pesticide only if the product provides economic, social, and environmental benefits that outweigh risks from its use. As part of FIFRA registration, EPA may establish requirements, which are typically contained in the label for the pesticide, to ensure that when used, it will not cause unreasonable adverse effects on the environment, including the aquatic environment. Thus, registration and use of a pesticide in accordance with its approved labeling or other relevant FIFRA requirements indicates that a pesticide is a product intended to be used for a beneficial purpose that is authorized by EPA and is not a waste. For these reasons, comments regarding the adequacy of EPA's pesticide regulatory program do not pertain to the legal interpretation of whether a pesticide is a "chemical waste" or a "biological material" for purposes of the definition of "pollutant" under the CWA.

Nonetheless, it is important to note that EPA disagrees with commenters' concerns that EPA's registration process does not take into account local conditions, existing water quality standards and use

designations, synergistic effects of multiple pesticides, inert ingredients, non-target aquatic organisms, and the effect of multiple applicators in the same area. The regulatory and non-regulatory tools under FIFRA provide means of addressing water quality problems arising from the use of pesticides. In **[68489]** particular, the pesticide registration and re-registration processes consider impacts on both human health from the presence of pesticides in drinking water, and on aquatic resources (*e.g.*, fish, invertebrates, plants, and other species in fresh water, estuarine, and marine environments). EPA requires a pesticide company to submit a substantial body of data in support of an application for registration. EPA then supplements this required database with information obtained through a systematic search of the open literature on the ecotoxicity of environmental substances. EPA compares the estimated environmental concentrations expected to result from use of a pesticide with toxicity values observed in required studies and studies from the open literature. This database provides sufficient information to conduct assessments of potential ecological and human health risks, including the identification of toxicologically significant degradation products and/or metabolites. For additional information on EPA's approach to ecological risk assessment in general, and endangered and threatened species in particular, see: *http://www.epa.gov/espp/consultation/ecorisk-overview.pdf.*

C. EPA's Interpretation of the Term "Pollutant" Under the CWA

Some commenters claimed that EPA's interpretation of the term "'pollutant" is inconsistent

with the Clean Water Act, with relevant case law, or with prior Agency statements. EPA disagrees with the commenters and believes its interpretation of the term "pollutant" is reasonable and consistent with the language and legislative intent of the Clean Water Act. As described above, pesticides applied in the circumstances addressed in today's regulation, in compliance with FIFRA, for their intended purpose, are not pollutants under the Act. EPA also disagrees with commenters that the term "biological materials" can only be read to include biological pesticides applied in the circumstances addressed by today's regulation—i.e., application to or over waters of the United States consistent with relevant requirements of FIFRA. EPA's analysis of the terms "chemical waste" and "biological materials" in the circumstances addressed by today's regulation is described in more detail above.

In addition, the Ninth Circuit Court of Appeals recently held that pesticides that do not generate a residue when applied directly to a lake to eliminate a non-native fish species are not "pollutants" under the CWA because they are not chemical wastes. *Fairhurst* v. *Hagener*, 422 F.3d 1146 (9th Cir. 2005). In so holding, the court considered the plain meaning of the term "chemical waste" and noted that its analysis was in accord with EPA's interpretation of the term in its July 2003 Interim Statement, and that EPA's interpretation is "reasonable and not in conflict with the expressed intent of Congress." Id. at 1149–50. Today's regulation is based on the same interpretation EPA first articulated in the Interim Statement, and is consistent with the *Fairhurst* court's holding.

Moreover, EPA's interpretation is not inconsistent with *Talent* and *Forsgren* as some commenters have

asserted. As explained below, these cases do not interpret the term "pollutant" as including the pesticide applications addressed in today's rule.

In *Headwaters* v. *Talent*, the Ninth Circuit reversed the District Court's dismissal of a CWA citizen suit against an irrigation district alleging that application of the herbicide Magnacide H to irrigation canals to control aquatic weeds and vegetation required an NPDES permit. The District Court had concluded that the application of the pesticide was adequately regulated under FIFRA, and further regulation under the CWA was unnecessary. *Headwaters* v. *Talent*, No. 98–6004–AA slip op. at 12 (D. Ore. Feb. 1, 1999). The Ninth Circuit found that residual from the application of Magnacide H was a pollutant in this case and that registration of the herbicide under FIFRA did not preclude applicability of the CWA. *Headwaters* v. *Talent*, 243 F.3d at 532. This conclusion is consistent with EPA's interpretation. As described above, EPA agrees that residual materials from pesticide applications are "pollutants" under the Act. In addition, the irrigation district in *Talent* failed to comply with a FIFRA registration requirement to contain the herbicide-laden water in an irrigation canal for a specified number of days. EPA's interpretation codified in today's action is that pesticides applied in the circumstances described in the rule are not "pollutants" where they are applied consistent with relevant FIFRA requirements. Thus, EPA's interpretation is consistent with the result reached by the *Talent* court.

In *League of Wilderness Defenders* v. *Forsgren*, the Ninth Circuit held that the aerial application of insecticides over National Forest lands in Washington

and Oregon to control a predicted outbreak of the Douglas fir tussock moth required an NPDES permit. However, the court in Forsgren stated incorrectly that the parties in the case did not dispute that the insecticides met the CWA definition of "pollutant." *League of Wilderness Defenders* v. *Forsgren*, 309 F.3d at 1184, n.2. In fact, the Forest Service in its brief before the District Court reserved its arguments on that particular issue. Because the Ninth Circuit erroneously assumed that the question of whether the applications were pollutants was not in dispute, it did not analyze the issue but simply stated that they were. *Id.* at 1185. The issue that the *Forsgren* court did analyze in detail was whether the airplanes from which the insecticides were sprayed are point sources under the CWA—a different issue from that addressed in today's interpretation.[3]

Commenters also claimed that EPA's interpretation is inconsistent with the Clean Water Act because the purpose for which a pesticide is applied is not relevant to the question of whether it is a pollutant under the Act. The commenters pointed primarily to two cases—*Hudson River Fisherman's Assn.* v. *City of New York*,

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[3] EPA's General Counsel issued a memorandum on September 3, 2003, addressing the Agency's views on the effect of the *Forsgren* decision. Specifically, EPA stated that it did not acquiesce outside the Ninth Circuit with the court's decision regarding the application of EPA regulation defining "silvicultural point source" at 40 CFR 122.27(b)(1), and would continue to follow its longstanding interpretation of the statute and these regulations. Memorandum from Robert E. Fabricant to Regional Administrators, "interpretive Statement and Guidance Addressing Effect of Ninth Circuit Decision in *League of Wilderness Defenders* v. *Forsgren* on Application of Pesticides and Fire Retardants," Sept. 3, 2003.

751 F.Supp. 1088 (S.D.N.Y.), affd., 940 F.2d 649 (2d Cir. 1991), and *Minnehaha Creek Watershed District* v. *Hoffman*, 597 F.2d 617 (8th Cir. 1979)—as supporting their assertion. However, both these cases are distinguishable from EPA's interpretation.

In *Minnehaha Creek*, the court was interpreting the terms "rock, sand, [and] cellar dirt" in the definition of "pollutant" in CWA Section 502(6). The federal appellants in that case appealed a District Court decision finding that the U.S. Army Corps of Engineers did not have jurisdiction under CWA Section 404 over the placement of riprap and the construction of dams in Minnehaha Creek and adjacent Lake Minnetonka. The District Court's decision was based on its conclusion that the creek and the lake were not navigable waters of the United States and that while the riprap and construction materials were "rock and sand," the activities at issue in the case were not within the purview of the Act because they did not significantly affect water quality. *Minnehaha Creek Watershed District* v. *Hoffman*, 449 F.Supp 876, 886 (D. Minnesota 1978). The Eighth Circuit disagreed and held **[68490]** that a significant alteration in water quality need not be demonstrated for a substance to be a pollutant. *Minnehaha Creek Watershed District* v. *Hoffman*, 597 F.3d at 626–27.

The Eighth Circuit stated in Minnehaha Creek that it found "no justification in the District Court's determination that whether the discharge of a particular substance *listed in s[ection] 502(6)* constitutes the discharge of a 'pollutant' under the Act depends upon the purpose for which the discharge is made." *Id.* at 627, emphasis added. EPA notes that nowhere in its opinion does the District Court reach

such a conclusion. In any case, EPA is not concluding that the question of whether a substance is a pollutant depends on the specific purpose for which it is discharged. Rather, EPA is interpreting what specific terms in section 502(6) mean in the context of certain pesticide applications.

The Second Circuit Court of Appeals decision in *Hudson River Fishermen's Assn.* v. *City of New York* is also distinguishable from the circumstances addressed in today's rule. In that case, the District Court held that discharges of chlorine and aluminum sulfate (alum floc) from an aqueduct into a reservoir were discharges of pollutants requiring an NPDES permit. First, this case involved the discharge of alum floc from a point source at a point when it was a "chemical waste" and, therefore, consistent with EPA's interpretation, properly constituted a pollutant under the statute. *Hudson River Fishermen's Assn.* v. *City of New York*, 751 F.Supp 1088, 1102. In contrast, today's rule addresses certain pesticides which are being applied in compliance with relevant FIFRA requirements and, for the reasons described above, are not pollutants.

Moreover, the court's holding that chlorine was a pollutant also referred to the chlorine in the aqueduct at the time it discharged into the reservoir, not at the time it was first added to the water. The court held that the chlorine was a pollutant, no matter how useful it may earlier have been, citing to the Eighth Circuit's decision in *Minnehaha Creek*. *Id.* at 1101. Similarly, EPA is not concluding that the question of whether substances listed in section 502(6) are pollutants depends on the purpose for which they are discharged. Rather, EPA is interpreting what specific terms in

section 502(6) (terms other than those addressed in *Minnehaha Creek*) mean in the context of these two types of pesticide applications.

Finally, while EPA's interpretation is not inconsistent with either *Hudson River* or *Minnehaha Creek*, it is further supported by the Ninth Circuit's decision in *Fairhurst* v. *Hagener*. In *Fairhurst*, the Ninth Circuit specifically considered the purpose for which the pesticide was applied—the same factor commenters claim is not relevant under *Hudson River* and *Minnehaha Creek*—and the fact that it was applied consistent with the product's FIFRA label, in concluding that it was not a pollutant under the CWA. *Fairhurst* v. *Hagener*, 422 F.3d 1146, 1150 ("Because intentionally applied and properly performing pesticides are not 'pollutants,' a potential discharger is not required to secure an NPDES permit for such pesticides before discharge.")

Some commenters also claimed that EPA's interpretation is inconsistent with positions taken by the government in several *amicus curiae* briefs related to the issues addressed by the interpretation. As mentioned above, these briefs reflected the government's evaluation of the law in the context of the specific factual situations at issue and did not result from the deliberative consideration through an administrative process, as today's rule does. As such, the briefs were not a comprehensive statement of EPA's legal position on the precise questions addressed in today's rule, nor did they reflect the exercise of EPA's legal and policy judgment after consideration of public comments. See Memorandum from Ann R. Klee to Benjamin Grumbles and Susan Hazen, "Analysis of Previous Federal Government

Statements on Application of Pesticides to Waters of the United States in Compliance with FIFRA," Jan. 24, 2005.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action." Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Order 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* This rule merely identifies two circumstances in which the application of a pesticide to waters of the United States consistent with all relevant requirements under FIFRA does not constitute the discharge

of a pollutant that requires an NPDES permit under the Clean Water Act.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to

a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business based on Small Business Administration (SBA) size standards at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. Because EPA is identifying two circumstances in which the application of a pesticide to waters of the United States consistent

with all relevant requirements under FIFRA does not constitute the discharge of a pollutant **[68491]** that requires a NPDES permit under the Clean Water Act, this action will not impose any requirement on any small entity.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most costeffective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide

for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA. For the same reason, EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. Thus, today's rule is not subject to the requirements of section 203 of UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national

government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. EPA is merely identifying two circumstances in which the application of a pesticide to waters of the United States consistent with all relevant requirements under FIFRA does not constitute the discharge of a pollutant that requires a NPDES permit under the Clean Water Act. Thus, Executive Order 13132 does not apply to this rule.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicited comment on the proposed rule from State and local officials. EPA additionally consulted with state officials in the development of the final rule. Especially important were consultations regarding the manner in which States in the Ninth Circuit currently permit pesticides in response to the *Talent* decision and how states use TMDLs and other authorities to address pesticide residuals.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." "Policies that have tribal implications" is defined in the Executive Order to include regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power

and responsibilities between the Federal government and Indian tribes."

This final rule does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. EPA is merely identifying two circumstances in which the application of a pesticide to waters of the United States consistent with all relevant requirements under FIFRA does not constitute the discharge of a pollutant that requires a NPDES permit under the Clean Water Act. Thus, Executive Order 13175 does not apply to this rule. Moreover, in the spirit of Executive Order 13175, and consistent with EPA policy to promote communications between EPA and tribal governments, EPA specifically solicited comment on the proposed rule from tribal officials.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

Executive Order 13045: "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This regulation is not subject to Executive Order 13045 because it is not economically significant as defined under Executive Order 12866 and because the Agency does not have reason to believe the environmental health and safety risks addressed by this action present a disproportionate risk to children. The regulation only interprets the legal scope of the NPDES permit requirement under the CWA and does not change how pesticide applications are addressed under FIFRA.

[68492] *H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This rule is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)). The only effect of this rule is to identify two circumstances in which the application of a pesticide to waters of the United States consistent with all relevant requirements under FIFRA does not constitute the discharge of a pollutant that requires a NPDES permit under the Clean Water Act.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104-113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standard bodies.

The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This rulemaking does not involve technical standards.

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**.

This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective January 26, 2007.

List of Subjects in 40 CFR Part 122

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

Dated: November 20, 2006.

Stephen L. Johnson,

Administrator.

For the reasons set forth in the preamble, chapter I of title 40 of the Code of Federal Regulations is to be amended as follows:

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

1. The authority citation for part 122 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

2. Section 122.3 is amended by adding paragraph (h) to read as follows:

§ 122.3 Exclusions.

* * * * *

(h) The application of pesticides consistent with all relevant requirements under FIFRA (i.e., those relevant to protecting water quality), in the following two circumstances:

(1) The application of pesticides directly to waters of the United States in order to control pests. Examples of such applications include applications to control mosquito larvae, aquatic weeds, or other pests that are present in waters of the United States.

(2) The application of pesticides to control pests that are present over waters of the United States, including near such waters, where a portion of the pesticides will unavoidably be deposited to waters of the United States in order to target the pests effectively; for example, when insecticides are aerially applied to a forest canopy where waters of the United States may be present below the canopy or when pesticides are applied over or near water for control of adult mosquitoes or other pests.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 03, 2009
LEONARD GREEN,
CLERK

THE NATIONAL COTTON COUNCIL OF AMERICA, ET AL.,	)	
Petitioners,	)	
v.	)	ORDER
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

BEFORE: GUY, SUHRHEINRICH, and COLE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green
Clerk

TITLE 7. AGRICULTURE
Chapter 6. Insecticides and Environmental Pesticide Control
Subchapter II—Environmental Pesticide Control

7 U.S.C. § 136

§ 136. Definitions

For purposes of this subchapter—

* * *

(j) Environment

The term "environment" includes water, air, land, and all plants and man and other animals living therein, and the interrelationships which exist among these.

* * *

(u) Pesticide

The term "pesticide" means (1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, (2) any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant, and (3) any nitrogen stabilizer, except that the term "pesticide" shall not include any article that is a "new animal drug" within the meaning of section 321(w)[1] of title 21, that has been determined by the Secretary of Health and Human Services not to be a new animal drug by a regulation establishing conditions of use for the article, or that is an animal feed within the meaning of section 321(x)[1] of title 21 bearing or containing a new animal drug. The term "pesticide" does not include liquid chemical sterilant products (including any sterilant or

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[1] See References in Text note below.

subordinate disinfectant claims on such products) for use on a critical or semi-critical device, as defined in section 321 of title 21. For purposes of the preceding sentence, the term "critical device" includes any device which is introduced directly into the human body, either into or in contact with the bloodstream or normally sterile areas of the body and the term "semi-critical device" includes any device which contacts intact mucous membranes but which does not ordinarily penetrate the blood barrier or otherwise enter normally sterile areas of the body.

* * *

TITLE 7. AGRICULTURE
Chapter 6. Insecticides and Environmental Pesticide Control

Subchapter II—Environmental Pesticide Control

7 U.S.C. § 136a

§ 136a. Registration of pesticides

(a) Requirement of registration

Except as provided by this subchapter, no person in any State may distribute or sell to any person any pesticide that is not registered under this subchapter. To the extent necessary to prevent unreasonable adverse effects on the environment, the Administrator may by regulation limit the distribution, sale, or use in any State of any pesticide that is not registered under this subchapter and that is not the subject of an experimental use permit under section 136c of this title or an emergency exemption under section 136p of this title.

* * *

(c) Procedure for registration

* * *

(5) Approval of registration

The Administrator shall register a pesticide if the Administrator determines that, when considered with any restrictions imposed under subsection (d) of this section—

(A) its composition is such as to warrant the proposed claims for it;

(B) its labeling and other material required to be submitted comply with the requirements of this subchapter;

(C) it will perform its intended function without unreasonable adverse effects on the environment; and

(D) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.

The Administrator shall not make any lack of essentiality a criterion for denying registration of any pesticide. Where two pesticides meet the requirements of this paragraph, one should not be registered in preference to the other. In considering an application for the registration of a pesticide, the Administrator may waive data requirements pertaining to efficacy, in which event the Administrator may register the pesticide without determining that the pesticide's composition is such as to warrant proposed claims of efficacy. If a pesticide is found to be efficacious by any State under section 136v(c) of this title, a presumption is established that the Administrator shall waive data requirements pertaining to efficacy for use of the pesticide in such State.

* * *

TITLE 7. AGRICULTURE
Chapter 6. Insecticides and Environmental Pesticide Control
Subchapter II—Environmental Pesticide Control

7 U.S.C. § 136j

§ 136j. Unlawful acts

(a) In general

(1) Except as provided by subsection (b) of this section, it shall be unlawful for any person in any State to distribute or sell to any person—

(A) any pesticide that is not registered under section 136a of this title or whose registration has been canceled or suspended, except to the extent that distribution or sale otherwise has been authorized by the Administrator under this subchapter;

(B) any registered pesticide if any claims made for it as a part of its distribution or sale substantially differ from any claims made for it as a part of the statement required in connection with its registration under section 136a of this title;

(C) any registered pesticide the composition of which differs at the time of its distribution or sale from its composition as described in the statement required in connection with its registration under section 136a of this title;

(D) any pesticide which has not been colored or discolored pursuant to the provisions of section 136w(c)(5) of this title;

(E) any pesticide which is adulterated or misbranded; or

(F) any device which is misbranded.

(2) It shall be unlawful for any person—

(A) to detach, alter, deface, or destroy, in whole or in part, any labeling required under this subchapter;

(B) to refuse to—

(i) prepare, maintain, or submit any records required by or under section 136c, 136e, 136f, 136i, or 136q of this title;

(ii) submit any reports required by or under section 136c, 136d, 136e, 136f, 136i, or 136q of this title; or

(iii) allow any entry, inspection, copying of records, or sampling authorized by this subchapter;

(C) to give a guaranty or undertaking provided for in subsection (b) of this section which is false in any particular, except that a person who receives and relies upon a guaranty authorized under subsection (b) of this section may give a guaranty to the same effect, which guaranty shall contain, in addition to the person's own name and address, the name and address of the person residing in the United States from whom the person received the guaranty or undertaking;

(D) to use for the person's own advantage or to reveal, other than to the Administrator, or officials or employees of the Environmental Protection Agency or other Federal executive agencies, or to the courts, or to physicians, pharmacists, and other qualified persons, needing such information for the performance of their duties, in accordance with such directions as the Administrator may prescribe, any information acquired by authority of this

subchapter which is confidential under this subchapter;

(E) who is a registrant, wholesaler, dealer, retailer, or other distributor to advertise a product registered under this subchapter for restricted use without giving the classification of the product assigned to it under section 136a of this title;

(F) to distribute or sell, or to make available for use, or to use, any registered pesticide classified for restricted use for some or all purposes other than in accordance with section 136a(d) of this title and any regulations thereunder, except that it shall not be unlawful to sell, under regulations issued by the Administrator, a restricted use pesticide to a person who is not a certified applicator for application by a certified applicator;

(G) to use any registered pesticide in a manner inconsistent with its labeling;

(H) to use any pesticide which is under an experimental use permit contrary to the provisions of such permit;

(I) to violate any order issued under section 136k of this title;

(J) to violate any suspension order issued under section 136a(c)(2)(B), 136a-1, or 136d of this title;

(K) to violate any cancellation order issued under this subchapter or to fail to submit a notice in accordance with section 136d(g) of this title;

(L) who is a producer to violate any of the provisions of section 136e of this title;

(M) to knowingly falsify all or part of any application for registration, application for experimental use permit, any information

submitted to the Administrator pursuant to section 136e of this title, any records required to be maintained pursuant to this subchapter, any report filed under this subchapter, or any information marked as confidential and submitted to the Administrator under any provision of this subchapter;

(N) who is a registrant, wholesaler, dealer, retailer, or other distributor to fail to file reports required by this subchapter;

(O) to add any substance to, or take any substance from, any pesticide in a manner that may defeat the purpose of this subchapter;

(P) to use any pesticide in tests on human beings unless such human beings (i) are fully informed of the nature and purposes of the test and of any physical and mental health consequences which are reasonably foreseeable therefrom, and (ii) freely volunteer to participate in the test;

(Q) to falsify all or part of any information relating to the testing of any pesticide (or any ingredient, metabolite, or degradation product thereof), including the nature of any protocol, procedure, substance, organism, or equipment used, observation made, or conclusion or opinion formed, submitted to the Administrator, or that the person knows will be furnished to the Administrator or will become a part of any records required to be maintained by this subchapter;

(R) to submit to the Administrator data known to be false in support of a registration; or

(S) to violate any regulation issued under section 136a(a) or 136q of this title.

* * *

TITLE 21. FOOD AND DRUGS
Chapter 9. Federal Food, Drug, and Cosmetic Act
Subchapter IV. Food

21 U.S.C. § 346a

§ 346a. Tolerances and exemptions for pesticide chemical residues

* * *

(b) Authority and standard for tolerance

* * *

(2) Standard

(A) General rule

* * *

(ii) Determination of safety

As used in this section, the term "safe", with respect to a tolerance for a pesticide chemical residue, means that the Administrator has determined that there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.

* * *

TITLE 33. NAVIGATION AND NAVIGABLE WATERS

Chapter 26. Water Pollution Prevention and Control

Subchapter I. Research and Related Programs

33 U.S.C. § 1251

§ 1251. Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be

developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

* * *

(d) Administrator of Environmental Protection Agency to administer chapter

Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter.

* * *

TITLE 33. NAVIGATION AND NAVIGABLE WATERS

Chapter 26. Water Pollution Prevention and Control

Subchapter I. Research and Related Programs

33 U.S.C. § 1254

§ 1254. Research, investigations, training, and information

* * *

(*l*) Collection and dissemination of scientific knowledge on effects and control of pesticides in water

(1) The Administrator shall, after consultation with appropriate local, State, and Federal agencies, public and private organizations, and interested individuals, as soon as practicable but not later than January 1, 1973, develop and issue to the States for the purpose of carrying out this chapter the latest scientific knowledge available in indicating the kind and extent of effects on health and welfare which may be expected from the presence of pesticides in the water in varying quantities. He shall revise and add to such information whenever necessary to reflect developing scientific knowledge.

(2) The President shall, in consultation with appropriate local, State, and Federal agencies, public and private organizations, and interested individuals, conduct studies and investigations of methods to control the release of pesticides into the environment which study shall include examination of the persistency of pesticides in the water environment and alternatives thereto. The

President shall submit reports, from time to time, on such investigations to Congress together with his recommendations for any necessary legislation.

* * *

(p) Agricultural pollution

In carrying out the provisions of subsection (a) of this section the Administrator shall, in cooperation with the Secretary of Agriculture, other Federal agencies, and the States, carry out a comprehensive study and research program to determine new and improved methods and the better application of existing methods of preventing, reducing, and eliminating pollution from agriculture, including the legal, economic, and other implications of the use of such methods

* * *

TITLE 33. NAVIGATION AND NAVIGABLE WATERS

Chapter 26. Water Pollution Prevention and Control

Subchapter II. Grants for Construction of Treatment Works

33 U.S.C. § 1288

§ 1288. Areawide waste treatment management

* * *

(b) Planning process

* * *

(2) Any plan prepared under such process shall include, but not be limited to—

* * *

(F) a process to (i) identify, if appropriate, agriculturally and silviculturally related nonpoint sources of pollution, including return flows from irrigated agriculture, and their cumulative effects, runoff from manure disposal areas, and from land used for livestock and crop production, and (ii) set forth procedures and methods (including land use requirements) to control to the extent feasible such sources;

* * *

TITLE 33. NAVIGATION AND NAVIGABLE WATERS

Chapter 26. Water Pollution Prevention and Control

Subchapter III. Standards and Enforcement

33 U.S.C. § 1311

§ 1311. Effluent limitations

* * *

(b) Timetable for achievement of objectives

In order to carry out the objective of this chapter there shall be achieved—

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314(d)(1) of this title; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2)(A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment

requirements and any other requirement under section 1317 of this title;

(B) Repealed. Pub. L. 97-117, § 21(b), Dec. 29, 1981, 95 Stat. 1632.

(C) with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 1317 of this title which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(E) as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989, compliance with effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 1314(a)(4) of this title shall require application of the best conventional pollutant control technology

as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(4) of this title; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989.

(3)(A) for effluent limitations under paragraph (1)(A)(i) of this subsection promulgated after January 1, 1982, and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989; and

(B) for any effluent limitation in accordance with paragraph (1)(A)(i), (2)(A)(i), or (2)(E) of this subsection established only on the basis of section 1342(a)(1) of this title in a permit issued after February 4, 1987, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established, and in no case later than March 31, 1989.

* * *

(e) All point discharge source application of effluent limitations

Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

* * *

TITLE 33. NAVIGATION AND NAVIGABLE WATERS

Chapter 26. Water Pollution Prevention and Control

Subchapter III. Standards and Enforcement

33 U.S.C. § 1319

§ 1319. Enforcement

* * *

(b) Civil actions

The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

(c) Criminal penalties

(1) Negligent violations

Any person who--

(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment

program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

(2) Knowing violations

Any person who—

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under

section 1344 of this title by the Secretary of the Army or by a State; or

(B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in a permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

(3) Knowing endangerment

(A) General rule

Any person who knowingly violates section 1311, 1312, 1313, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to

a fine of not more than $250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than $1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.

(B) Additional provisions

For the purpose of subparagraph (A) of this paragraph—

(i) in determining whether a defendant who is an individual knew that his conduct placed another person in imminent danger of death or serious bodily injury—

(I) the person is responsible only for actual awareness or actual belief that he possessed; and

(II) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant;

except that in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information;

(ii) it is an affirmative defense to prosecution that the conduct charged was consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of—

(I) an occupation, a business, or a profession; or

(II) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent;

and such defense may be established under this subparagraph by a preponderance of the evidence;

(iii) the term "organization" means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons; and

(iv) the term "serious bodily injury" means bodily injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(4) False statements

Any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under this chapter, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than 2 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under

this paragraph, punishment shall be by a fine of not more than $20,000 per day of violation, or by imprisonment of not more than 4 years, or by both.

(5) Treatment of single operational upset

For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(6) Responsible corporate officer as "person"

For the purpose of this subsection, the term "person" means, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

(7) Hazardous substance defined

For the purpose of this subsection, the term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of this title, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of Title 42, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of this title, and (E) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15.

* * *

TITLE 33. NAVIGATION AND NAVIGABLE WATERS

Chapter 26. Water Pollution Prevention and Control

Subchapter III. Standards and Enforcement

33 U.S.C. § 1329

§ 1329. Nonpoint source management programs

(a) State assessment reports

(1) Contents

The Governor of each State shall, after notice and opportunity for public comment, prepare and submit to the Administrator for approval, a report which—

(A) identifies those navigable waters within the State which, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain applicable water quality standards or the goals and requirements of this chapter;

(B) identifies those categories and subcategories of nonpoint sources or, where appropriate, particular nonpoint sources which add significant pollution to each portion of the navigable waters identified under subparagraph (A) in amounts which contribute to such portion not meeting such water quality standards or such goals and requirements;

(C) describes the process, including intergovernmental coordination and public participation, for identifying best management practices and measures to control each category and subcategory of nonpoint sources and, where

appropriate, particular nonpoint sources identified under subparagraph (B) and to reduce, to the maximum extent practicable, the level of pollution resulting from such category, subcategory, or source; and

(D) identifies and describes State and local programs for controlling pollution added from nonpoint sources to, and improving the quality of, each such portion of the navigable waters, including but not limited to those programs which are receiving Federal assistance under subsections (h) and (i) of this section.

(2) Information used in preparation

In developing the report required by this section, the State (A) may rely upon information developed pursuant to sections 1288, 1313(e), 1314(f), 1315(b), and 1324 of this title, and other information as appropriate, and (B) may utilize appropriate elements of the waste treatment management plans developed pursuant to sections 1288(b) and 1313 of this title, to the extent such elements are consistent with and fulfill the requirements of this section.

(b) State management programs

(1) In general

The Governor of each State, for that State or in combination with adjacent States, shall, after notice and opportunity for public comment, prepare and submit to the Administrator for approval a management program which such State proposes to implement in the first four fiscal years beginning after the date of submission of such management program for controlling pollution added from nonpoint sources to the navigable waters within the State and improving the quality of such waters.

(2) Specific contents

Each management program proposed for implementation under this subsection shall include each of the following:

(A) An identification of the best management practices and measures which will be undertaken to reduce pollutant loadings resulting from each category, subcategory, or particular nonpoint source designated under paragraph (1)(B), taking into account the impact of the practice on ground water quality.

(B) An identification of programs (including, as appropriate, nonregulatory or regulatory programs for enforcement, technical assistance, financial assistance, education, training, technology transfer, and demonstration projects) to achieve implementation of the best management practices by the categories, subcategories, and particular nonpoint sources designated under subparagraph (A).

(C) A schedule containing annual milestones for (i) utilization of the program implementation methods identified in subparagraph (B), and (ii) implementation of the best management practices identified in subparagraph (A) by the categories, subcategories, or particular nonpoint sources designated under paragraph (1)(B). Such schedule shall provide for utilization of the best management practices at the earliest practicable date.

(D) A certification of the attorney general of the State or States (or the chief attorney of any State water pollution control agency which has independent legal counsel) that the laws of the State or States, as the case may be, provide

adequate authority to implement such management program or, if there is not such adequate authority, a list of such additional authorities as will be necessary to implement such management program. A schedule and commitment by the State or States to seek such additional authorities as expeditiously as practicable.

(E) Sources of Federal and other assistance and funding (other than assistance provided under subsections (h) and (i) of this section) which will be available in each of such fiscal years for supporting implementation of such practices and measures and the purposes for which such assistance will be used in each of such fiscal years.

(F) An identification of Federal financial assistance programs and Federal development projects for which the State will review individual assistance applications or development projects for their effect on water quality pursuant to the procedures set forth in Executive Order 12372 as in effect on September 17, 1983, to determine whether such assistance applications or development projects would be consistent with the program prepared under this subsection; for the purposes of this subparagraph, identification shall not be limited to the assistance programs or development projects subject to Executive Order 12372 but may include any programs listed in the most recent Catalog of Federal Domestic Assistance which may have an effect on the purposes and objectives of the State's nonpoint source pollution management program.

(3) Utilization of local and private experts

In developing and implementing a management program under this subsection, a State shall, to the

maximum extent practicable, involve local public and private agencies and organizations which have expertise in control of nonpoint sources of pollution.

(4) Development on watershed basis

A State shall, to the maximum extent practicable, develop and implement a management program under this subsection on a watershed-by-watershed basis within such State.

* * *

TITLE 33. NAVIGATION AND NAVIGABLE WATERS

Chapter 26. Water Pollution Prevention and Control

Subchapter IV. Permits and Licenses

33 U.S.C. § 1342

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit

program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the

navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

* * *

TITLE 33. NAVIGATION AND NAVIGABLE WATERS

Chapter 26. Water Pollution Prevention and Control

Subchapter V. General Provisions

33 U.S.C. § 1362

§ 1362. Definitions

Except as otherwise specifically provided, when used in this chapter:

* * *

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

* * *

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * *

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

* * *

TITLE 42. THE PUBLIC HEALTH AND WELFARE
Chapter 82. Solid Waste Disposal
Subchapter I. General Provisions

42 U.S.C. § 6903

§ 6903. Defitions

As used in this chapter:

* * *

(27) The term "solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of Title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923) [42 U.S.C.A. § 2011 et seq.].

* * *

PART 261—IDENTIFICATION AND LISTING OF HARZARDOUS WASTE
Subpart A—General
Subchapter I—General Provisions
Subpart A—General

40 C.F.R. § 261.2

§ 261.2 Defition of solid waste.

(a)(1) A *solid waste* is any discarded material that is not excluded under § 261.4(a) or that is not excluded by a variance granted under §§ 260.30 and 260.31 or that is not excluded by a non-waste determination under §§ 260.30 and 260.34.

* * *

(b) Materials are solid waste if they are *abandoned* by being:

(1) Disposed of; or

* * *

(c) Materials are solid wastes if they are *recycled*—or accumulated, stored, or treated before recycling—as specified in paragraphs (c)(1) through (4) of this section.

(1) *Used in a manner constituting disposal.*

* * *

(ii) However, commercial chemical products listed in § 261.33 are not solid wastes if they are applied to the land and that is their ordinary manner of use.

* * *

No. 06-4630 (and consolidated cases)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE NATIONAL COTTON COUNCIL OF AMERICA, et al.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for Review of Final Action of the United States Environmental Protection Agency

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RESPONDENT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY'S MOTION FOR STAY OF MANDATE

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April 9, 2009

[Tables of contents and authorities omitted]

INTRODUCTION

Respondents U.S. Environmental Protection Agency and Lisa P. Jackson (collectively, "EPA") move, in accordance with Fed. R. App. P. 41(d), for a stay of the mandate in this case until April 9, 2011.[1] EPA seeks this stay to avoid significant disruption to EPA and the 46 states that, along with the U.S. Virgin Islands, administer the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") permit programs. EPA also seeks this stay to avoid significant disruption among the hundreds of thousands of persons and businesses nationwide who apply pesticides to, over, or near waters of the United States without NPDES permits and now, as a result of this Court's decision, will need to obtain permits in order to

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[1] EPA previously moved for an extension of time in which to file a petition for rehearing. On February 25, 2009, the Court granted EPA's motion for an extension to April 9, 2009. EPA has decided not to seek rehearing of the Court's decision in this case. Instead, EPA requests through this motion a stay of issuance of the mandate until April 9, 2011.

continue doing so consistent with the Clean Water Act. The affected pesticide applicators include local government entities that spray to and over waters to control mosquitos, farmers who apply pesticides to eradicate aquatic pests, foresters who aerially spray over waters to prevent outbreaks of timber pests, and the U.S. Coast Guard, which sprays to kill insects that interfere with the maintenance of navigation devices. As a result of this Court's decision, almost all of these pesticide applications will likely be illegal under the Clean Water Act unless and until EPA and the non-federal permitting authorities issue NPDES permits that authorize and regulate pesticide applications consistent with the requirements of the Clean Water Act. EPA has already received numerous inquiries from States and pesticide applicators asking how they should proceed if permits covering the application of pesticides to, over, or near waters of the United States are not issued prior to the issuance of the mandate.

Neither EPA nor the non-federal NPDES permitting authorities currently have in place permits capable of addressing the many pesticide applications affected by this Court's decision. These permitting authorities do not have the resources to immediately process and issue thousands of individual permits for each person who now needs a NPDES permit for a pesticide application to, over, or near a water of the United States. As a result, EPA intends to issue (and anticipates that the States will issue) general NPDES permits to address these applications of pesticides. EPA and authorized States issue general permits to address a large number of similarly situated dischargers in lieu of issuing individual permits to each discharger. Both the Environmental Petitioners and

this Court referred to the potential use of general permits as a means to allow uses of aquatic pesticides. Environmental Petitioners' Opening Brief at 57-60; *Nat'l Cotton Council v. EPA*, 553 F.3d 927, 930-31 (6th Cir. 2009).

The issuance of general permits, however, takes time. The development of a general permit for pesticide pollutant discharges will require in-depth environmental and engineering analyses. EPA must identify the types of pesticides and applications that require permit coverage, and it must develop permit conditions sufficient to meet Clean Water Act requirements. EPA must give public notice of a draft permit, provide for public comment, and respond to those public comments prior to issuing the permit. EPA also plans to work with nonfederal permitting authorities to assist them in developing their own NPDES general permits. In addition, EPA and the non-federal permitting authorities must inform and educate the regulated community, who will need to conform their practices to the permits' requirements after it is issued. As explained in this motion, EPA estimates this administrative process – involving development, proposal and issuance of general permits – will take two years.

Until the issuance of appropriate general permits, affected people and businesses will not likely be able to obtain permit coverage for the application of pesticides to, over, or near waters of the United States. Thus, probably for the next 24 months, thousands of pesticide applicators face the unpalatable choice of either not applying pesticides to, over, or near waters of the United States or facing the its mandate until April 9, 2011 to allow EPA and authorized permitting

authorities sufficient time to develop and issue Clean Water Act permits containing appropriate terms to govern the discharge of pesticide pollutants to waters of the United States.

BACKGROUND

Since the enactment of the Clean Water Act in 1972, EPA has not required persons applying pesticides directly to or over waters of the United States for the purpose of controlling pests in or over those waters to obtain a NPDES permit.[2]

See 71 Fed. Reg. 68,483, 68,484 (Nov. 27, 2006). In 2006, EPA issued a final rule titled "Application of Pesticides to Waters of the United States in Compliance with FIFRA," 71 Fed. Reg. 68,483 (Nov. 27, 2006).[3] Under this rule, which was challenged by petitioners in this case, EPA identified two circumstances in which the application of pesticides consistent with all relevant requirements under FIFRA to or over, including near, waters of the United

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[2] The Court, in its opinion, referenced pesticide labels in use for over 30 years that stated that the pesticide could not be discharged into water bodies unless in accordance with an NPDES permit. Nat'l Cotton Council, 553 F.3d at 931. This labeling requirement addressed pesticides present in waste streams, not the application of pesticides to target pests. Further, although pesticides in return flows from irrigated agriculture or in agricultural storm water discharges may be pollutants in certain circumstances, Congress expressly excluded these discharges from NPDES permitting requirements. 33 U.S.C. § 1342(l)(1) (prohibition on requiring a Clean Water Act permit for discharges composed entirely of return flows from irrigated agriculture); § 1362(14) (defining point source not to include agricultural storm water discharges)

[3] "FIFRA" is the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136, *et seq.*

States is not the discharge of a pollutant and, therefore, does not require an NPDES permit. *Id.* at 68,485.

On January 7, 2009, the Court issued an opinion granting in part and denying in part the environmental petitioners' petitions for review and denying the industry petitioners' petitions. *Nat'l Cotton Council*, 553 F.3d at 940. The Court found EPA's interpretation of the statutory terms "pollutant" and "point source" contrary to the text of the Clean Water Act. *Id.* at 935-40. It held that "dischargers of pesticide pollutants are subject to the NPDES permitting program in the Clean Water Act." *Id.* at 940. The Court vacated EPA's rule. *Id.*

LEGAL ARGUMENT

A. This Court Has Discretion to Stay the Mandate to Avoid Disrupting Regulatory Programs and the Regulated Community.

A court of appeals that finds an agency rule contrary to law and vacates the agency rule may stay its mandate to allow the agency to take additional regulatory action to avoid substantial disruption to the regulated program and the regulated community. *See Chamber of Commerce v. SEC*, 443 F.3d 890, 909 (D.C. Cir. 2006) (staying mandate for 90 days to allow SEC to address matter and avoid substantial disruption of mutual fund industry); *Independent U.S. Tanker Owners v. Dole* , 809 F.2d 847, 854-55 (D.C. Cir. 1987) (withholding mandate for six months to allow agency to undertake further proceedings and avoid further disruption of domestic shipping market). When considering whether to stay the mandate, courts examine the "seriousness of the order's deficiencies and the disruptive consequence of an interim change that may itself be changed." *Allied Signal v. U.S. Nuclear*

Regulatory Comm'n, 988 F.2d 146, 150-51 (D.C. Cir. 1993).

The Ninth Circuit Court of Appeals, in a case presenting nearly identical vacatur issues to the one before this Court, recently affirmed a district court decision that postponed vacatur of a Clean Water Act permitting exclusion for 24 months to provide time for EPA to issue appropriate NPDES permits. *Northwest Environmental Advocates v. EPA*, 537 F.3d 1006, 1010 (9th Cir. 2008). The district court in *Northwest Environmental Advocates* considered a challenge to an EPA regulation that excluded certain vessel discharges from NPDES permit requirements. *Id.* The district court found that the discharges of pollutants, including ballast water, from non-military vessels must occur only under the regulation of a NPDES permit. *Id.* Rather than vacating the regulation immediately, however, the district court ordered the regulatory exemption vacated no later than a date two years after issuance of its order. *Id.* At 1025-26.

The district court's analysis supporting a delay in vacating the rule, quoted and affirmed by the Ninth Circuit, is of particular relevance to this case. The district court recognized that an immediate vacatur of a regulatory structure that had stood for over 30 years was a practical impossibility. *Id.* at 1026. Thus, the district court framed its task as balancing the need for prompt action to address environmental harm "against the need to allow EPA adequate freedom to address a complicated issue." *Id.* at 1026. The district court also recognized that EPA has an expertise in the area that the court cannot approach. *Id.* Although the district court found the regulation excluding vessel discharges

from NPDES permitting requirements inconsistent with the Clean Water Act, the court sought to avoid the significant harm to shipping and the economy if ballast water could not be discharged from vessels without a permit and no permits were available to authorize the discharges. *Id.* at 1026-27. The district court and court of appeals recognized the substantial task presented to EPA - to "bring discharges previously exempted by § 122.3(a) within the permitting process of the CWA." *Id.* at 1026. The Ninth Circuit therefore affirmed the district court's decision to withhold vacating the rule for 24 months to provide appropriate time to EPA to address permitting issues. For the reasons set forth in the next section, this Court should withhold its mandate for a similar period.

B. This Court Should Stay Its Mandate Until April 9, 2011, to Enable EPA and the Authorized States to Issue General Permits to Regulate Discharges of Pesticide Pollutants To, Over, or Near Waters of the United States.

Unless stayed, this Court's mandate will effectively prohibit for many months the discharge of almost all pesticides to, over, or near waters of the United States. Because the Court determined that all biological pesticides are pollutants under the Act, the application of all biological pesticides to, over, or near waters of the United States will be illegal unless applied in accordance with a NPDES permit. *Nat'l Cotton Council*, 553 F.3d at 937-38. In addition, because virtually all applications of chemical pesticides leave pesticide pollutants in the form of excess or residual quantities, almost all applications of chemical pesticides to, over, or near waters will now require NPDES

permits. *Id.* at 938-40. There is not currently in place a Clean Water Act general permit for all pesticide applications addressed by this Court's decision, and the individual permitting option is not a practical avenue at this time. In short, the removal of the exclusion for pesticide discharges creates the same regulatory dilemma that existed in the context of vessel discharges. A similar judicial response is appropriate.

As explained in the next section, an immediate vacatur of the Rule would have significant disruptive consequences to the NPDES permitting programs of EPA and the 47 non-federal permitting authorities responsible for regulating discharges of pollutants. In the following section, EPA explains that, until the permitting authorities establish appropriate permitting programs, the vacatur of the rule will have significant disruptive consequences to public health and welfare by limiting the application of pesticides to control mosquitoes, agricultural pests, invasive species and other undesired animals and plants.

1. The Disruptive Consequences to Permitting Authorities Requires a Stay of the Mandate.

Although the rule the Court vacated had only been in place since 2006, the rule codified what had been EPA's practice during the more than 35 years EPA has administered the Clean Water Act. During that time, EPA has never issued a single NPDES permit for pesticide applications to or over waters of the United States to target pests in or over the water. *See* 71 Fed. Reg. at 68,484; *Gem County Mosquito Abatement Dist. v. EPA*, 398 F. Supp. 2d 1, 5 (D.D.C. 2005). Similarly, the 47 non-federal permitting authorities have not issued permits for pesticide applications to or over waters of the United States except in limited cases,

primarily in response to recent litigation. Because of this Court's opinion, however, EPA and the non-federal authorities must now issue either individual permits or general permits for pesticide pollutant discharges to allow and regulate appropriate applications of pesticides to, over, or near waters of the United States. Vacatur of the rule prior to the issuance of permits will have significant disruptive consequences to the regulatory program.

The use of individual permits to authorize the hundreds of thousands of discharges of pesticide pollutants to waters of the United States that occur annually does not offer a feasible approach. Individual permits are issued based upon the permittee submitting a permit application. The permitting authority must then evaluate appropriate terms and conditions to comply with relevant technology based effluent limits and applicable water quality standards, prepare a draft permit and accompanying fact sheet that contains the rationale for the permit conditions, and provide public notice and a public comment period of at least 30 days. *See* 33 U.S.C. §§ 1311(b)(1)(C), 1311(b)(2)(A); 40 C.F.R. §§ 122.44(d); 124.6, 124.8. 124.10(b). If a State is the permitting authority, a proposed individual permit must then be sent to EPA, which may make comments, objections or recommendations for up to an additional 90 days. 40 C.F.R. § 123.44.

Requiring individual permits for all applicators of pesticides to, over, or near waters of the United States would seriously disrupt NPDES programs. The permitting authorities cannot handle the addition of pesticide applicators to the individual permit program. Nationally, approximately 45,700 facilities are

authorized to discharge under individual permits. Declaration of James A. Hanlon, attached as Exhibit 1, ("Hanlon Decl.") ¶ 11. EPA estimates that 365,000 pesticide applicators perform approximately 5.6 million pesticide applications annually to, over, or near waters of the United States to control pests such as mosquitoes and gypsy moths, combat algae, weeds and other undesirable vegetation and attack invasive species such as zebra mussels. *Id.* ¶¶ 4, 5. Including these dischargers in the individual permit programs would increase these programs by a factor of eight. In addition, the consideration and issuance of an individual permit typically takes many months. This delay could effectively result in a denial of coverage in many cases because the need for pesticide applications often cannot be anticipated months in advance. *Id.* ¶ 6; *see* Declaration of Teung F. Chin, PhD, attached as Exhibit 2, ("Chin Decl.") ¶¶ 2, 6-7, 10-11. Thus, the addition of potentially hundreds of thousands of individual permit applications from pesticide applicators would likely overwhelm permit authorities and prove ineffective in providing timely authorizations.

A general permit system does not offer a short-term solution to the permit coverage dilemma. Where there are a large number of similarly situated dischargers, EPA may issue a general permit covering a category of dischargers in lieu of issuing individual permits to each discharger. 40 C.F.R. § 122.28; *see South Florida Water Management District v. Miccosukee Tribe of Indians, et.al.* 124 S.Ct. 1537, 1545 at Fn * (2004) (recognizing the role EPA's general permits serve in reducing administrative burdens).

The procedures required for issuing a general permit, however, require a significant commitment of time and resources. Like individual permits, general permits must contain conditions necessary to meet Clean Water Act requirements. 40 C.F.R. §§ 122.44(a), (d).[4] The permitting authority prepares a fact sheet that includes a basis for the draft permit conditions. 40 C.F.R. § 124.8. The permitting authority must give the public notice of the draft permit and provide at least 30 days for public comment. 40 C.F.R. § 124.10(b). Any interested person may submit written comments on the draft permit and may request a public hearing. 40 C.F.R. § 124.11. The permitting authority must issue a response to comments when it issues the final permit. 40 C.F.R. § 124.17; see 40 C.F.R. § 122.28(b)(1) (general permits may be issued in accordance with the applicable requirements of Part 124).

For the reasons set forth in Mr. Hanlon's declaration, EPA estimates that the critical steps required to issue a general permit to cover applications of pesticide pollutants to, over, or near waters of the United States will take an additional 24 months. Hanlon Decl., ¶¶ 7, 18-36. EPA commenced the general permit process upon issuance of this Court's opinion in January, when it started an initial review of available data associated with potential pesticide point sources. *Id.* ¶¶ 4, 21. EPA also commenced review of existing state pesticide permits. *Id.* ¶ 21. EPA is working to identify the different types of pesticide applications to, over, or near waters of the United States, and the number and frequency of these

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[4] "FIFRA" is the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136, *et seq.*

applications. *Id.* This includes examining the different methods of pesticide applications and identifying best management practices that applicators employ to minimize the amount of pesticides that enters the water. *Id.* This analysis potentially forms the basis of the required technology-based effluent limitations for the different categories of pesticide applications that would be covered under a general permit. *Id.* Because EPA has not previously developed effluent limitation guidelines for the direct application of pesticides, EPA must develop such effluent limitations based upon its best professional judgment using the appropriate levels of controls (*e.g.*, best practicable control technology) established in the Clean Water Act and associated regulations. *Id.* ¶ 26; See 33 U.S.C. § 1314(b); 40 C.F.R. § 125.3(c)(2).

After undertaking this data gathering, analysis and assessment, EPA will prepare a draft general permit. Hanlon Decl. ¶¶ 25-29. EPA must publish any proposed general permit in the Federal Register and anticipates providing a 90-day public comment period because of the significant public interest in this issue. *Id.* ¶ 30. EPA must prepare a written response to all significant comments submitted, which EPA estimates will take substantial time given the public interest. *Id.* ¶ 31.

Further, EPA must coordinate with other federal agencies and States to ensure that any general permit complies with other federal and state requirements. EPA may be required to engage in consultation to comply with the Endangered Species Act. Hanlon Decl. ¶ 34. In accordance with Clean Water Act Section 401, 33 U.S.C. § 1341, EPA must seek certification of the permit from all States, territories

and tribes where discharges authorized under EPA's permit may occur. *Id.* ¶ 32. EPA must also assure consistency with the Coastal Zone Management Act. *Id.* ¶ 33. Each of these coordination activities will require significant time and resources to complete. *Id.* ¶¶ 32-24.

Finally, EPA will need to coordinate with and assist 46 States and the U.S. Virgin Islands, each of which will likely seek to issue its own general permits under their NPDES permit authority. *Id.* ¶¶ 7, 13. A general permit issued by EPA will provide permit coverage only in the four States in which EPA is the permitting authority, plus the United States' territories, tribal lands and federal facilities. *Id.* ¶ 7. Although the States will likely develop their general permits contemporaneously with EPA's development of its own permit, as a practical matter, States are unlikely to finalize their own permits until EPA issues a general permit that serves as a national model. The States must still complete their own notice and comment proceedings.

After the general permit is drafted, EPA and non-federal permitting authorities will have to ensure proper implementation of the general permit through outreach. Hanlon Decl. ¶ 36. The outreach will provide applicators, who have not previously been subject to NPDES permitting, time to bring their practices into conformance with the final permit and, if necessary, to submit written notice to seek coverage under the general permit.

In sum, EPA estimates that a stay of the mandate until April 9, 2011 will be sufficient to enable it and the non-federal permitting authorities to develop, propose and issue appropriate general permits to authorize and

regulate certain pesticide discharges to waters of the United States consistent with CWA requirements. Without such permitting authority, EPA and the other permitting agencies will experience disruptive consequences to their NPDES permit programs. In addition, significant disruptions to the regulated community, discussed in the next section, will likely occur.

2. Issuance of the Mandate at this Time Likely Will Disrupt Efforts to Protect Public Health, Agriculture and Other Historical Uses of Pesticides.

By issuing a mandate vacating the Rule either immediately or prematurely, the Court risks serious disruption of public health initiatives, agriculture and other activities. Numerous public entities apply pesticides to, over, or near waters of the United States to reduce risks posed by mosquitos. Agriculture and timber industries apply pesticides to, over, or near waters to combat devastating pests. Federal agencies use pesticides to support American agriculture and to facilitate navigation on the nation's waters. Virtually all of these pesticide users will have to make a difficult choice – apply pesticides in violation of the Clean Water Act or suspend pesticide uses – if the rule is vacated before NPDES permits are available to authorize appropriate uses.

Hundreds of local government agencies apply pesticides to, over, or near waters of the United States to control mosquito populations. Approximately 1,200 applicators nationwide, through an estimated 19,000 applications annually, spray mosquito larvicides directly to water to kill mosquito larvae in the water. Hanlon Decl. ¶ 16. These same applicators, through an

estimated 461,000 applications annually, aerially spray mosquito adulticides, often over waters of the United States. *Id.* Mosquitos spread infectious diseases, including West Nile virus and strains of encephalitis. *Id.* ¶ 17. Unchecked mosquito populations also adversely impact outdoor activities, tourism and the general public health and welfare. Because these mosquito abatement activities require in many instances the application of pesticides to, over, or near waters of the United States, absent a stay of mandate, they will not likely occur until permitting authorities issue permits.

Issuance of the mandate prior to the availability of permits will also disrupt the agriculture industry and the activities of the Department of Agriculture. Agricultural production requires the flexibility to respond quickly and appropriately to changing conditions, and the time required to obtain an individual NPDES permit will hamper a farmer's ability to respond to needed changes in crops or pesticides. Chin Decl., ¶¶ 2, 6-7. In addition, several Department of Agriculture agencies engage in applications of pesticides to, over, or near waters in fulfilling their responsibilities to respond to emerging threats and emergency situations posed by pests. *Id.* ¶¶ 9-11. The Forest Service and the Animal and Plant Health Inspection Service rely on pesticides to prevent outbreaks of pests, and these efforts could be disrupted if the mandate is not stayed pending issuance of permits. *Id.* The Agricultural Research Service engages in research programs that could also be disrupted or damaged by an inability to apply pesticides until issuance of an NPDES permit. *Id.* ¶¶ 12-13.

Issuance of the mandate also may adversely impact navigation on the nation's waters. The Coast Guard uses pesticides to address wasps and other stinging insects that frequently nest in navigational devices and interfere with maintenance of the devices. Declaration of Erik S. Anderson, attached as Exhibit 3, ¶ 5. The Coast Guard applies pesticides to navigational aides to prevent poisonous plants from interfering with the functions of these navigational devices. *Id.* ¶ 6. These navigational aids are often in or adjacent to waters of the United States, and the pesticides used by the Coast Guard may, therefore, leave residual amounts in the water after use. *Id.* ¶ 4. As a result, issuance of the mandate will require the Coast Guard to suspend pesticide applications until a permit is available to authorize its applications, causing additional risks to navigation in the interim. *Id.* ¶ 7.

Thus, not staying the mandate will have potentially serious and disruptive consequences on significant sectors of the national economy. Even if EPA and the States exercise enforcement discretion and do not enforce the Clean Water Act against applicators of pesticide pollutants who apply consistent with FIFRA, pesticide applicators are subject to suits brought by citizens seeking to enforce the Clean Water Act. *See* 33 U.S.C. § 1365. For example, each of the pesticide application cases cited in this Court's opinion arose from a citizen suit. The threat of citizen suits has the potential to halt most pesticide applications to, over, or near waters of the United States until permit authorization is available.

C. The Potential Harm to Waters of the United States By Leaving the Rule in Place Does Not Require Issuance of the Mandate.

Postponing issuance of the mandate until appropriate permits are in place should not result in any unreasonable harm to waters of the United States. During this interim period, the final rule will exclude from permitting requirements only those pesticide applications undertaken consistent with FIFRA requirements. FIFRA requirements are established to avoid any unreasonable risk to humans or the environment. *See* 7 U.S.C. §§ 136a(c)(5) & (7), § 136(bb). Leaving the rule in place for an additional 24 months will mean that pesticide application practices employed in recent decades will continue for an additional short period while EPA and the States work to develop and issue appropriate NPDES permits.

Leaving the rule in place will also avoid the disruption caused by an interim change in practice that will likely again be changed. *See Allied Signal*, 988 F.2d at 150-51. Environmental Petitioners in this case did not advocate a ban on all pesticide applications to, over, or near waters of the United States. Rather, they argued that such pesticide applications should be subject to Clean Water Act NPDES permitting requirements. *See* Environmental Petitioners' Opening Brief at 44-49, 57. EPA and the States will likely issue general permits to authorize some applications of pesticide pollutants to, over, or near waters of the United States subject to certain terms and conditions. This Court should not issue a mandate that will effectively ban application of all pesticides to, over, or near waters of the United States for the interim period before the permitting agencies can issue

permits that authorize certain pesticide pollutant discharges.

CONCLUSION

For the reasons set forth above, the Court should stay issuance of its mandate in this case until April 9, 2011.

Respectfully submitted,

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April 9, 2009

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE NATIONAL COTTON COUNCILOF AMERICA, et al., Appellant, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY Appellee	) Nos. 06-4630; 07-3180/3181/3182/3183/3184/3185/3186/3187/3191/3236

DECLARATION OF JAMES A. HANLON

I, James A. Hanlon, declare that the following statements are true and correct to the best of my knowledge, information, and belief, and are based on my personal knowledge and information supplied to me by employees of the United States Environmental Protection Agency (EPA or Agency) under my supervision and information provided by my colleagues from EPA's Office of Pesticides Program (OPP).

INTRODUCTION

1. I am James A. Hanlon, Director of the Office of Wastewater Management in EPA's Office of Water. I have served as the Office Director since April of 2002. As the Director of the Office of Wastewater Management (OWM), I direct the EPA office responsible for national program direction to the National Pollutant Discharge Elimination System

(NPDES) permit program, including oversight of authorized State and Territorial NPDES programs. OWM has oversight responsibilities and provides technical assistance supporting EPA regional water programs. OWM also administers federal financial and technical assistance for publicly owned treatment works (e.g., municipal sewage collection systems and treatment plants). I supervise a staff of approximately 110 permanent full-time and part-time federal employees. OWM's annual program (operating) budget for fiscal year 2009 is approximately $28 million. OWM's operating budget also supports the management of State grants which total near $950 million.

2. Prior to my current position, I served as the Deputy Office Director of the Office of Science and Technology (OST) in EPA's Office of Water beginning in 1991. OST is responsible for the scientific and technical basis for federal water quality and safe drinking water programs, including establishment of national effluent limitations guidelines and analytical test methods. OST also provides scientific and technical support to other Offices with program implementation responsibilities within the Office of Water, including OWM, the Office of Wetlands, Oceans, and Watersheds, and the Office of Ground Water and Drinking Water. I have worked for EPA for more than 36 years. I received a Bachelor of Science degree in Civil Engineering from the University of Illinois and a Masters of Business Administration degree from the University of Chicago. I am a registered Professional Engineer in the State of Illinois.

3. I have read the Sixth Circuit Court of Appeal's Opinion of January 7,2009, in National Cotton Council

of America, et al., v. EPA. I understand that the Environmental and Industry Plaintiffs challenged EPA's Final Rule: Application of Pesticides to Waters of the United States in Compliance with FIFRA ("Final Rule") as codified at 40 C.F.R. 122.3(h), which excludes from NPDES permitting those pesticide applications consistent with FIFRA requirements that are applied to or over, including near, waters of the United States. As a remedy in this litigation, I understand that the Court has determined that the Final Rule should be vacated.

4. Since January 7,2009, EPA has been analyzing the Court's decision and its impacts while also providing support to the states and communicating to sectors of the regulated community and environmental groups. I have heard first-hand the concern and confusion amongst the permitting authorities and pesticide applicators about who will be required to obtain a NPDES permit. EPA has determined that the Court's decision clearly impacts the following point source discharges to, over or near waters of the United States: discharges of chemical pesticides that leave a residual or excess and discharges of all biological pesticides. My staff has also worked with the OPP to clarify what pesticide use patterns will trigger a requirement to obtain an NPDES permit. At least the following large categories are covered when sprayed to, over, or near waters of the United States:

- Mosquito larvicides
- Mosquito adulticides
- Herbicides used to control weeds in lakes and ponds
- Herbicides used to control weeds in irrigation systems and other waterways

- Herbicides used to control weeds along ditch banks in agricultural drainage systems
- Insecticides used in wide-area insect suppression programs
- Herbicides used in wide-area control programs directed at aquatic invasive plant species
- Herbicides, insecticides and other pesticides used in forestry programs when applied over waters of the United States.

5. Using available information sources, OPP estimated the number of pesticide applicators and applications for the identified use patterns identified in paragraph 4. OPP estimates that these categories represent approximately 365,000 applicators and 5.6 million applications a year. OPP has also provided information to characterize the pest control needs which these pesticides address and the availability of other, nonpesticidal methods of controlling the target pests. Finally, OPP has provided information on the impacts of relying only on non-pesticidal methods of pest control. The information developed by OPP appears in Appendix A.

6. Because of the large number of similarly situated discharges, EPA intends to issue a general permit to cover pesticide discharges covered by the Decision. Individual permits are designed to address discrete discharges from fixed locations and would require an individual public notice and comment period. In fact, I do not believe either EPA or states would be able to provide timely coverage to pesticide applicators using individual permits for nearly all of the types of pesticide applications covered by the Decision. Thus, as a practical matter, I believe that EPA and NPDES authorized states will not be able to provide applicators

with -a way to comply with the CWA's NPDES requirements without drafting a general permit for covered application of pesticides.

7. A vacatur will require EPA and authorized states and territories to immediately develop NPDES permits that comply with NPDES regulatory requirements found in 40 CFR Part 122 and described in more detail below. This process will take 2 years to ensure that all necessary NPDES permit requirements are met. This estimate is partly based on EPA's recent experience in issuing the NPDES general permit for vessel discharges, which took over 2 years to complete. Similarly, as discussed below, EPA is suggesting 24 months to develop a final NPDES pesticides general permit, including the time to work concurrently with authorized states and territories to draft and finalize their general permits simultaneously with EPA. When EPA issues an NPDES permit, it is only effective in non-authorized states (4), in territories, Indian Country, and on federal facilities.- It is very important that the authorized permitting authorities keep in step with EPA to ensure national compliance with the CWA. A stay would provide EPA and NPDES authorized states and territories the time necessary to develop, propose, and implement an NPDES permit that would satisfy the CWA requirements.[1]

8. Vacatur of the rule before a NPDES permit can be issued by the permitting authority would place pesticide applicators in a vulnerable position where they would be subject immediately to potential citizen

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[1] EPA has authorized 46 States and 2 U.S. Virgin Islands to implement the NPDES program. Where, in this declaration I refer to authorized states, I am referring to the authorized states and the U.S. Virgin Islands.

suits for violating the CWA if they discharge pesticide pollutants to, over or near waters of the United States. Moreover, the intentional discharge of pollutants without a permit could technically subject an applicator to criminal liability under the CWA, however, EPA would not expect criminal charges to be brought during the time period prior to NPDES permitting authorities being able to make a permit available for pesticide applicators. Significant harm to public health could result if applicators choose not to apply pesticides in order to reduce the risk of liability. Some states have informed us that applicators in their states would not apply pesticides after the mandate in this case issues and prior to when a NPDES permit is available. A stay of the mandate until April 9, 2011 would prevent disruption to mosquito abatement programs, farming operations, forest management, irrigation districts, and other permittees.

9. For the reasons set out in this Declaration, I believe that the immediate vacatur of the Final Rule would cause significant disruption to both EPA's and authorized states' NPDES permitting programs, as well as the regulated community and others including federal agencies. First, I will provide a detailed description of the significant adverse effects arising from an immediate vacatur. Second, I will explain the time intensive NPDES permit development process that gives rise to EPA's request that the Court stay the mandate until April 9, 2011 (24 months).

ANTICIPATED IMPACTS TO EPA AND NPDES AUTHORIZED STATES AND TERRITORIES IF THE MANDATE ISSUES BEFORE NPDES GENERAL PERMIT IS ISSUED

10. The mandate, if it issues prior to the

availability of an NPDES permit, will effectively prohibit the discharge of almost all pesticides to, over or near waters of the United States. This would result in substantial disruption for both EPA and the 47 authorized NPDES permitting authorities. If the Court's vacatur were to take effect before EPA and authorized states and territories are able to issue NPDES general permits, significant numbers of pesticide applicators would immediately be faced with discharging without a permit. There are significant legal risks (third-party citizen suits) for any person determined to be discharging a pollutant into waters of the United States without a permit. Given these risks, I would predict that significant numbers of pesticide applicators would seek to obtain NPDES permits immediately upon issuance of the mandate, where the permitting authorities would not be prepared to respond.

11. NPDES authorized permitting authorities are concerned about whether they will have adequate resources to issue newly required permits that could potentially include hundreds of thousands of applications in each state. The current universe of point sources requiring NPDES permits to discharge includes individual and general permittees. Nationally, approximately 45,700 facilities are authorized to discharge under individual permits. Another 120,000 facilities (including 70,000 vessels) are authorized under general permits for non-storm water discharges. Until the recent inclusion of the 70,000 vessel dischargers, in general, the universe of non-storm water permittees remained more or less stable since the inception of the NPDES Program in 1972. The 1987 CWA amendments established NPDES permit

requirements for storm water discharges and the number of permits for stormwater discharges has increased significantly since then. EPA's 1990 and 1999 actions to promulgate the NPDES regulations for storm water substantially expanded the universe of point sources subject to NPDES permit requirements. Today, approximately 7,000 municipalities (approximately 1000 in 1990 and another 6000 in 1999) require NPDES permits for discharges from municipal separate storm sewers; 270 of these need individual permits. Approximately 96,500 industrial storm water point sources need permits. Approximately 250,000 point sources of storm water associated with construction activity require permits each year. Thus, the current total universe requiring NPDES permits (whether individual or general) is approximately 411 ,470 facilities. While most of the latter storm water discharges are authorized under general permits, more federal and state employees, resources, and expertise are now required to effectively manage the NPDES Program than ever before.

12. State governments have not matched the increased NPDES permitting work load with an increase in State environmental budgets. States have indicated that their environmental budgets have either been static or in decline for many years. In February 2003, the National Academy of Public Administrators confirmed an analysis by State environmental administrators demonstrating a budget shortfall of between seven hundred million to one billion dollars for implementation of State CWA programs. *Understanding What States Need to Protect Water Quality*, Report by a Panel of the National Academy of Public Administrators for the U.S. Environmental

Protection Agency (2003). States generally have even fewer resources today. While the resources from the American Recovery and Reinvestment Act of 2009 will help fund needed infrastructure projects, additional funds under this Act are not available for NPDES activities. At the federal level, available resources for NPDES oversight activities have declined as well. In addition to increased numbers of point sources needing permits, other factors have increased pressure on NPDES permitting authorities including: (1) more complex legal challenges to entire programs and permits from the public, environmental groups, and industry; (2) increasing complexity of certain types of permits stemming from more sophisticated water quality-based regulatory requirements; (3) high employee attrition rates in NPDES permitting staff, particularly state employees; and (4) declining federal grant funding, in real terms, that has historically augmented the operating budgets of state permitting agencies.

13. In past efforts to bring new categories of point source discharges into the NPDES permitting program, EPA has built in time to allow states to update their NPDES programs to address the new category prior to requiring permits for that category. EPA has spoken with the states and they anticipate needing at least 24 months in order to develop and implement a federally compliant program, with a longer time being needed if state statutes or regulations must be revised prior to permits being issued to pesticide applicators.[2] I acknowledge the

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[2] EPA usually allows State programs one to two years to modify their programs, which includes EPA review and approval. This time is necessary for states to conform to changes in the

need to issue and implement this general permit in an expedient manner. Under ideal conditions, EPA would build time onto the end of EPA's general permit process to enable states to model their general permits on EPA's. However, in order to expedite the process, here EPA plans on working concurrently with the states so they may simultaneously be working on their general permits.

ANTICIPATED IMPACTS TO PESTICIDE USERS IF THE MANDATE ISSUES BEFORE NPDES GENERAL PERMIT IS ISSUED

14. Pesticide users are concerned with what applications will be covered and how the upcoming spring spraying season will be affected. Pesticide users are extremely concerned that once the mandate is effective, they will become immediately subject to the requirement to have an NPDES permit and without one, will be subject to enforcement, and/or liable for citizen suits. If a pesticide applicator is required to have an NPDES permit, but cannot obtain one because the permitting authority is unable to issue a timely permit, an applicator would face a difficult choice. If the applicator chooses to apply the pesticide, he would risk being in violation of the CWA which would expose him to penalties of up to $32,500 a day. Alternatively, an applicator could decide not to apply a pesticide. The impact of not using a pesticide would depend on many factors, including the type and extent of the pest

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Federal program. The timeframe typically depends on whether changes are required to State regulations or to statutes. See, e.g., 40 C.F.R. § 123.62(e). Most states will not have to modify their regulations because they can issue NPDES permits for pesticide applications covered by the Decision under their current authorities.

problem, the nature of the harm caused by the pest, and whether non-pesticidal alternatives were available to address the pest problem. The Court's vacatur will potentially affect many types of pesticide applicators who are not accustomed to obtaining NPDES permits while also requiring permitting authorities to develop and issue NPDES permits for a class of dischargers that they have little experience permitting.

15. The sheer number of applicators requesting NPDES permits will be significant. Although EPA is still considering aspects of the Court's decision that will ultimately affect the scope of the general permit, the Decision will clearly require large numbers of pesticide applications to be covered under an NPDES general permit. At the very least, when the Court vacates the Final Rule, NPDES permits will be needed for each pesticide application that is applied directly to or over waters of the United States to control pests. Examples of such pests include mosquitoes, which transmit infectious diseases such as encephalitis and West Nile Virus, gypsy moths, which defoliate forests causing growth loss or the death of trees; algae and weeds, which can clog irrigation canals reducing the amount of water available to irrigate crops; and invasive species such as zebra mussels, which attach to and block water intakes for municipal water supplies and hydroelectric plants. Information from OPP shows that as many as 365,000 applicators perform more than 5.6 million of these types of applications annually, and would hence need NPDES permit coverage.

ACTIVITIES PROJECTED TO BE IMPACTED BY A NPDES GENERAL PERMIT

16. To illustrate the magnitude, I have included the following information developed by OPP on the

impacts of premature vacatur of the EPA Final Rule on mosquito control programs in the United States. According to OPP, there are approximately 1200 Mosquito Abatement Districts (MADs) and other agencies in the United States that apply mosquito control pesticides, and we estimate conservatively that each MAD employs at least one applicator. In addition, OPP's analysis of-available information, including information from the National Agricultural Aviation Association, Florida Coordinating Council for Mosquito Control and EPA data, indicates that there are 99 million acre treatments with adulticides per year and 4 million acre treatments with larvicides. (An acre treatment represents a single application of a pesticide to an acre of land or water. Multiple applications to the same acre result in multiple acre treatments.) Based on information from these data sources on the distribution of aerial and ground applications made, and the number of acres treated per application by air and ground, there are approximately 461 ,000 applications with adulticides and 19,000 applications of larvicides per year. Together, the instances of adulterine applications, and the instances of parricide applications yield the total estimate of 480,000 pesticide applications made annually by MADs and other agencies involved in mosquito control.

17. Programs to control mosquito populations are important for protecting public health. Although most types of mosquito"-transmitted diseases have been eradicated . from the United States, mosquitoes still carry some types of disease-causing organisms which they can transmit when they bite people or animals, notably including various forms of encephalitis, West

Nile Virus, and dengue.[3] Disease carrying mosquito species are found throughout the U.S., especially in urban areas and coastal or in inland areas where flooding of low lands frequently occurs.

DEVELOPMENT OF A PROPOSED GENERAL PERMIT[4]

18. The development of a legally defensible general permit for covered pesticide discharges will be a complex process that requires in-depth analyses of technical issues, including the technology options used by pesticide applicators and the impact of their applications on water quality. NPDES permit requirements can be found at 40 CFR Parts 122. The requirements for approved NPDES state programs can be found in 40 CFR Part 123. Permit procedures can be found in 40 CFR Part 124. These regulations apply to EPA and to EPA NPDES programs administered by 47 state authorities.

19. The process to develop a general permit takes time (40 CFR Part 122, Subpart C). The development of a NPDES permit for pesticide pollutant discharges will require in-depth environmental and technical analyses. The permitting authority must identify the types of pesticides and applications that need permit coverage, and develop permit conditions necessary to meet the CWA requirements. The permitting authority must give public notice of a draft permit, provide for public comment, and respond to those

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[3] A more in depth discussion of these types of diseases can be found at: Joint Statement on Mosquito Control in the United States from the U.S. Environmental Protection Agency (EPA) and the U.S. Centers for Disease Control and Prevention (CDC), at: http://www.epa.gov/opp00001/health/mosguitoes/mosguitojoint.htm.

public comments prior to issuing the permit. In parallel to these efforts, EPA the Agency plans to work with the state permitting authorities to assist them in developing their NPDES general permits. In addition, it is imperative for EPA and authorized states to inform and educate the regulated community regarding the permit requirements and the process to obtain permit coverage before the Court's mandate issues. As explained in this declaration, EPA estimates this administrative process to develop, propose, issue, and implement general permits will take until April 9, 2011, or 24 months to complete.

20. EPA must adhere to the following critical steps described below in order to develop permit conditions and requirements that comply with the NPDES regulatory requirements. Most of these steps are necessarily sequential under EPA regulations governing the permitting process. However, EPA is committed, where possible, to conduct tasks concurrently with other tasks to reduce the length of time it will take to complete the process. That process requires rigorous information gathering, collaboration with a variety of EPA experts, and careful technological and scientific analyses. The analyses will provide EPA with the critical information it needs to develop a technically sound general permit and meet the NPDES statutory and regulatory requirements found at 40 CFR Parts 122 and 125 .

21. Identify information needs, collect and analyze data The first step in the development of an NPDES general permit is to collect the data necessary for a preliminary understanding of the scope of the universe of sources that might be permitted, existing practices used by and controls on those sources, and the possible

technology-based and water quality-based requirements that might be included in one or more NPDES permits for those sources. EPA has begun to collect a wide variety of information and will continue to do so as it develops permits for pesticide applicators. EPA will continue to engage in the following activities to collect and/or analyze the necessary information:

- Collection and review of information about pesticide labeling requirements and other aspects of the FIFRA program from EPA employees with expertise in pesticide regulations under FIFRA and by EPA employees with an expertise in the NPDES permit program under the CWA
- Review existing data on the effects of the relevant pesticides on water quality.
- Review existing state permits and other authorities that regulate pesticides and the extent to which they meet federal requirements.
- Collect and analyze data on the number of pesticide applicators and applications.
- Collect and analyze data on existing state water quality standards for pesticides, waters designated as impaired by these pesticides and any total maximum daily loads for pesticides.
- Review pesticide use patterns and analyze the extent to which different permits or requirements would be appropriate.
- Analyze the extent to which existing pesticide labels require an integrated pest management approach to pesticide use, including consideration of the least toxic alternative.

- Review whether special permit requirements will be necessary to address inert ingredients and adjuvants.
- Review the types of application equipment and best management practices employed to minimize the impact of pesticides on water quality.

In my experience, the time it takes to develop and analyze such data can be lengthy and averages between 12 and 18 months, depending on the complexity of the universe to be permitted, in order to draft permit conditions and limitations (40 CFR Parts 123.43 and 123.44). In light of the urgency that would be created by the Court's vacatur, I estimate that a minimally adequate effort to identify information needs, and collect and analyze data could be performed in 3 months.

22. EPA's Office of Pesticide Programs (OPP) has an extensive database on the toxicity, environmental fate, and other properties of pesticides. In addition, under FIFRA, which OPP administers, any person who produces a pesticide must report annually on the identity and amount of pesticide product produced. This information, together with data from USDA and private sources, give EPA a general understanding of the amounts of pesticide production and usage. Finally, OPP has additional information concerning equipment used to apply pesticides, methods of integrated pest management techniques, and other aspects of pesticide use that may be relevant to the development of a CWA general permit.

23. While OPP has collected a significant amount of data about pesticide usage and ingredients, it is critical for OWM to synthesize and analyze this data for

CWA regulatory purposes because OPP data has been analyzed only under FIFRA.

24. Scope and define universe to be permitted Because EPA will be developing a program for pesticide applicators who have never before had NPDES permits, it is EPA's experience that there will be "gray areas" that will require EPA to make decisions about whether some categories of pesticide applicators are or are not required to have an NPDES permit. EPA will need to clarify which applicators are eligible to be covered under the general permits developed by EPA. After analyzing the appropriate information and making preliminary decisions regarding the potential requirements likely to be required of certain categories of pesticide applicators, EPA will need to decide whether it will be necessary to develop different permits for specific subcategories of pesticide applicators. This process will most likely take place concurrently with the data analysis process described above.

25. Develop draft permit and fact sheet Prior to issuance of an NPDES permit, EPA or an approved state must develop a draft permit and fact sheet that explains the basis for the requirements and conditions in the draft permit. *See* 40 CFR 124.8(a). EPA must provide notice of these documents to the public and give the public an opportunity to comment on them. *See* 40 CFR Part 124.10. The development of these documents requires EPA to develop the permits' technology-based effluent limitations, any more stringent effluent limitations necessary to protect water quality, monitoring and reporting requirements and, standard and special conditions. These are discussed below. In my experience, in order to prepare

a draft permit that will be developed sufficiently to allow for meaningful public comment and a legally defensible final permit, there must be several iterations of preliminary draft documents by the EPA workgroup, discussions with knowledgeable stakeholders and management review and decisions. anticipate that this process will extend approximately 6 months beyond the initial data collection period.

26. Develop technology based effluent limitations EPA will need to develop the technology-based permit limitations for the permit. The GWA requires that such permit limits reflect the "Best Available Technology Economically Achievable" (BAT). *See* 33 U.S.G.A §1311 (b)(2)(A). Because there is no national effluent limitations guideline for pesticide applicators, EPA will need to develop technology based effluent limitations on a "best professional judgment" (BPJ) basis considering the same factors applicable to the development of an effluent guideline. 40 GFR 125.3(c)(2). This process will begin during our initial data analyses, depending on what data is received.

27. Develop water quality based effluent limitations, if and where necessary An NPDES permit may not authorize a discharge that will cause or contribute to the violation of water quality standards. *See* 33 U.S.G.A. §1311 (b)(1)(G). Because water quality standards are state specific, whether a discharge would violate water quality standards can vary from state to state. An NPDES permit must contain a water quality based permit limit if there is a reasonable potential for the discharge to cause or will take place concurrently with the critical steps described above.

28. Monitoring and reporting requirements

Permits must specify all monitoring and reporting that the permittee must perform. *See* 40 CFR 122.410). Such requirements vary depending on the nature of the effluent limitations in the permit. EPA will make efforts to ensure that any such requirements provide information that is useful and does not duplicate reporting that is being required under other state or federal laws. EPA is required by the Paperwork Reduction Act to develop an Information Collection Request (ICR) that estimates the burden of collecting and reporting information required by EPA. 44 U.S.C. 3501, et seq. The estimate must be based on estimates of the number of permittees and the average cost of the burden imposed on individual permittees. The ICR is made available for public comment along with the draft permit. EPA is required to consider the public comments, revise the ICR as appropriate, and then forward the ICR to Office of Information and Regulatory Affairs at the Office of Management and Budget (OIRA), which again provides public notice. The draft ICR process will be prepared while preparing the proposed general permit.

29. Standard conditions and special conditions All permits contain standard conditions that are required by 40 CFR Parts 122.41 and 122.42 and which delineate the legal, administrative and procedural requirements of the permits. Because they are "standard", EPA does not expect to need significant time to develop these for the general permit. Special conditions, on the other hand, may take considerable time to develop. Special conditions are non-numeric limits that require the permittee to undertake activities designed to reduce the overall quantity of pollutants being discharged, or to reduce the potential for discharges of

pollutants. As is described in the U.S. EPA Permit Writers Manual at page 137, special conditions may be used for "facilities discharging pollutants for which data are absent or limited such that derivations of technology or water quality-based effluent limitations are difficult or impossible." Special conditions may contain preventative requirements such as best management practices. They also may impose additional monitoring requirements or special studies that provide the permit writer data to evaluate the need for changes in permit limitations. Because of the unique challenges of, and EPA's lack of experience with, developing NPDES permits for the pesticide applicators, EPA may need to expend considerable effort considering the need for and developing special conditions for the permit.

30. Public notice and public hearings After EPA finishes drafting the proposed general permit, it is required to issue a public notice of the draft permit and to provide the public a minimum of 30 days to comment on the permit. 40 CFR 124.10. If a hearing is scheduled, the comment period is automatically extended until the close of the hearing. 40 CFR 124.12(c). A hearing is required whenever there is significant public interest expressed during the comment period. I anticipate such interest and therefore EPA will most likely hold a hearing. Based on this anticipated interest, I believe there would be a benefit to providing a longer comment period such as the 90 days that EPA often provides for significant actions. This would also allow EPA an opportunity to schedule public hearings during the comment period and for commenters to then be able to include information presented at those hearings in their

comments. This process will begin immediately after the draft general permit is completed and ready for publication. I anticipate that this process will take 3 months.

31. Respond to comments and develop Administrative record At the close of the comment period on the proposed general permit, the work group must review the comments to determine whether appropriate changes to the draft permit should be made.[5] Even if comments do not result in such changes, EPA must prepare a written response to all significant comments. The time it takes to respond to comments is dependent on the number of comments and the complexity of the issues that are raised. For example, in response to the Federal Register Notice for the draft NPDES general permits for discharges incidental to non-recreational vessels, EPA received over 1600 comments and more than 10,000 pages of government reports and publications, scientific papers, and other information. The response to comment document which responded to all significant comments regarding the Vessels General Permit was 1,273 pages long and took four months of intense effort to complete. I anticipate a similar or greater level of public interest

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[5] EPA intends to form a workgroup of co-regulators. The goal for this workgroup will be to provide EPA information on state pesticide permit programs, what works, what doesn't, and identify any state Agency barriers that could impede a state's timely issuance of Pesticides General Permits and/or processes that must be employed to remove these barriers. EPA will also confer with Association of American Pesticide Control Officials (AAPCO) and the State FIFRA Issues Research and Evaluation Group (SFIREG). AAPCO is an association that encourages uniformity among the states in their pesticide regulatory programs. Its members consist of state and federal pesticide regulatory officials.

in a general permit for covered pesticide applications, ultimately, requiring as much, if not more of a significant effort to respond to comments as was required for the Vessels General Permit. During this period, the Agency will also revise the permit fact sheet and other analyses in light of comments received. estimate that EPA will ,require 8 months to respond to comments and develop and publish a final permit. During this time, EPA will simultaneously perform related activities that various statutes require before the permit is final and which are described below.

32. CWA § 401 Certification. Under CWA § 401, EPA may not issue an NPDES permit unless it has obtained a certification (or a waiver of certification) from States, Territories, and certain Tribes where discharges authorized under the permit occur, regarding whether an authorized discharge will comply with their water quality standards or other appropriate requirements of their law. EPA must send letters to the certifying jurisdictions requesting written determinations regarding certification under CWA § 401. EPA will notify the certifying jurisdictions that EPA may not issue a permit authorizing discharges into their waters until the certifying agency has granted certification under CWA § 401, or has waived its right to certify by not responding to the request for certification within 45 days from the date the draft permit was mailed to them. In addition, EPA will notify the certifying jurisdictions of the statutory and regulatory requirements applicable to CWA § 401 certifications, including the requirement that certifications must contain any specific conditions necessary to assure compliance with their water quality standards or other appropriate requirements of

their law. 33 U.S.C. § 1341(d); 40 C.F.R. § 124.53(e) (1). States may publicly notice and solicit comment on their 401 certifications. This process will take a minimum of two months but will occur during the period when EPA is developing the response to comments on the draft permit and preparing the final permit.

33. Coastal Zone Management Act. Similarly, EPA may not issue a general . permit authorizing discharges into waters of a State until after determining whether its action is consistent to the maximum extent practicable with the enforceable policies of approved State coastal zone management programs under the Coastal Zone Management Act ("CZMA"). 15 C.F.R. 930.31 (d) and 930.36(e). EPA consults on its consistency determination with the affected State(s). A State may respond to EPA with conditions to the general permit that allow the State to concur with EPA's consistency determination. If EPA does not incorporate the State coastal zone management agency's conditions into the general permit or if the State coastal zone management agency objects to the general permit, then the general permit is not available for use by potential general permit users in that State unless the applicant who wants to use the general permit provides the State agency with the applicant's consistency determination and the State agency concurs. 15 C.F.R. 930.31(d). The National Oceanic and Atmospheric Administration (NOAA), the federal agency that administers the CZMA, has explained that "a State objection to a consistency determination for the issuance of a general permit would alter the form of CZMA compliance required, transforming the general permit into a series of case by case CZMA decisions and requiring an individual who

wants to use the general permit to submit an individual consistency certification to the State agency in compliance with 15 CFR part 930." 71 FR 788,793. In any State that has not provided conditions for incorporation into the permit, as well as any State that has not objected to the permit, EPA's CZMA compliance requirements derive from CZMA section 307(c)(1). *Id.* I expect that this process will occur simultaneously with the 401 certification process.

34. Endangered Species Act Consultation: Concurrent with the development of the proposed general permit, EPA will devote substantial resources to fulfilling its obligations under the Endangered Species Act (ESA), if EPA determines it is necessary. The ESA requires Federal agencies to ensure that the actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of their designated critical habitats. Pursuant to ESA § 7(a)(2) and its implementing regulations at 50 C.F.R. § 402.14(c), EPA will submit a request for consultation package to the National Marine Fisheries Service and the U.S. Fish and Wildlife Service ("Services") regarding the issuance of the Pesticides General Permit, if EPA determines that consultation is indicated because of the nature of activities that may take place under a permit. EPA intends to develop a biological evaluation using the best available scientific and commercial data to analyze the potential effects of the proposed general permit upon listed species or critical habitat and a description of relevant listed species and their designated habitat. EPA will support the Services on their development of a biological opinion, if one is

necessary. This will be a significant endeavor since the Pesticides General Permit will cover at least 500 active ingredients and as many as 900 inert ingredients. We estimate that it will take the entire length of the stay for the Endangered Species Act consultation, if it is determined to be necessary.

35. Issue final permit The final general permit and supporting materials will reflect appropriate resolution of comments received and issues raised following the proposal. The final general permit will undergo an internal review process. A notice will be prepared that will be published in the Federal Register. This process will take place during the 8 month period identified above, which includes: response to comments, 401 certification, CZMA determination, preparation of the final Information Collection Request and OMS review of the Information Collection Request.

36. Implementation: EPA believes additional time is required after the final issuance of the general permit to make the regulated community aware of its terms and conditions. Given that most applicators will not have ever been subject to an NPDES permit, and depending on what the final permit requires, applicators will need time to bring their practices into conformance with the final permit. The general permit will specify whether or not some or all applicators must file a Notice of Intent prior to being covered by the general permit. Notices of Intent to be covered by a general permit often must be accompanied by documents that describe the permittee's best management practices or other plans that the permittee will implement. The permittee would need time to develop and submit such documents. Although I can not predict the extent to which the final general

permit will impose requirements that will take time for applicators to be able to comply with, I estimate that 4 months would be a minimally reasonable time to educate applicators and allow them to come into compliance with the terms of a new general permit. Four months will also provide time to non-federal authorized permitting authorities to issue and begin implementing their final general permits.

37. I am aware that twenty-three states have developed permits to cover some types of pesticide discharges. I am aware California issued its general permit on an emergency basis four months after the Headwaters decision to authorize certain short term and seasonal discharges of pesticide pollutants by public entities for resource or pest management. Additionally, the State of Washington issued its general permit 15 months after the Headwaters decision to authorize certain pesticide applications directed to aquatic plants. However, these permits cover only a specific subset of the universe of applicators and pesticides that will likely be covered by the general permit that EPA issues, such as pesticides for the control of weeds, algae, mosquitoes, non-indigenous fish, crustaceans and insects. Additionally, EPA must meet the rigorous statutory requirements outlined above. The estimated time that EPA is requesting the Court to consider reflects the additional time needed to develop, propose, and issue a general permit for all pesticide applications that are covered under the Opinion. My staff is evaluating the scope of these permits, their provisions, and requirements for maintaining and protecting water quality and compliance with the CWA. Thus, the time frames in which these two States issued their general permits do

not represent the time needed by EPA and the States to issue permits in response to this Decision.

PAST EPA EXPERIENCE IN ISSUANCE OF VESSELS GENERAL PERMIT

38. As briefly discussed above, EPA recently issued the Vessels General Permit. That permit, which also addressed a category of discharges that had previously been exempt, is a useful illustration of the general permitting process and the time necessary to draft a general permit. I believe a similar amount of time is necessary to develop, propose, and issue an NPDES general permit for point source discharges of pesticides. The Vessels General Permit was a result of litigation over a long-standing EPA regulation that excluded discharges incidental to the normal operation of a vessel from the need to obtain a NPDES permit. The Vessels General Permit covers discharges incidental to the normal operation of vessels. The Vessels General Permit took over two years to propose and finalize. I have no reason to believe that this process would be any faster or simpler for pesticide discharges subject to the Court's decision.

SUMMARY OF TIME REQUESTED TO STAY THE MANDATE

EPA estimates that it needs until April 9, 2011 before the rule is vacated to develop, propose, and take final action to issue an NPDES general permit that would be consistent with and satisfy the CWA requirements. In developing the NPDES General Permit for Pesticide Applications we will work closely with authorized states and will encourage them to develop their general permits concurrent with the development of EPA's draft general permit to expedite implementation.

CONCLUSION

I declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge and belief.

Executed on April 8, 2009

/s/James A. Hanlon
James A. Hanlon

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE NATIONAL COTTON COUNCILOF AMERICA, et al., Appellant, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY Appellee	Nos. 06-4630; 07-3180/3181/3182/3183/3184/3185/3186/3187/3191/3236

DECLARATION OF TEUNG F. CHIN, PhD.

I, Teung F. Chin, declare that the following statements are true and correct to the best of my knowledge, information and belief, and are based on my personal knowledge and information supplied to me by employees of the United States Department of Agriculture under my supervision:

1. I am the Acting Director, Agricultural Research Service, Office of Pest Management Policy, United States Department of Agriculture (USDA), Washington, D.C. I have held this position since January 2009. I have nineteen years' experience with pesticide regulatory policy in the food industry and in the federal government including the Environmental Protection Agency's (EPA's) Office of Pesticide Programs, USDA's Animal and Plant Health Inspection Service (APHIS), and currently in USDA's

Office of Pest Management Policy. I have interacted extensively on pesticide regulatory issues with a broad spectrum of grower and farmer organizations, applicators, and mosquito control officials. I have also been involved with numerous pest action programs undertaken by APHIS and by USDA's Forest Service and research programs undertaken by the Agricultural Research Service.

2. I am writing to describe the harm that will be sustained by United States farmers and by USDA agencies if this Court's ruling in the above-captioned cases is put into effect without a stay to allow the EPA and states time to develop the appropriate NPDES general permits. The Court's decision will have profound implications for American farmers, potentially extending the application of the Clean Water Act to agricultural activities that EPA has never regulated before. The EPA's current NPDES individual permitting process may not meet the demands of agricultural production. Not only could the failure to obtain a timely NPDES permit for pesticide application disrupt planting for the current crop year, it could hamper American farmers' emergency pest management efforts and their ability to respond quickly to new pest infestations or threats of infestations, thus increasing the risk of crop losses.

3. Additionally, several USDA agencies engage in the aerial application of pesticides, and could be affected by the Court's decision. The Forest Service and APHIS occasionally respond to emerging threats and emergency situations, and the inability to get a timely NPDES permit prior to the time EPA and the states issue general permits for pesticide discharges could compromise the agencies' ability to respond with

efficiency and flexibility to these emerging threats and emergency situations. The Agricultural Research Service may have to curtail its research programs, setting back years of research. The time associated with obtaining an NPDES individual permit could substantially curtail the agencies' use of pesticides. As I will describe below, for the Forest Service, this could result in diminished efforts to protect the National Forests from pest infestation and could potentially increase the risk and severity of wildfire. For APHIS, delays associated with obtaining NPDES individual permits could result in established new pests or diseases which could have been eradicated with timely applications of pesticides.

I. Harm to United States Agricultural Producers

4. Pesticides include insecticides, herbicides, fungicides, piscicides, nematicides, miticides, fumigants, rodenticides, repellents, pheromones, insect growth regulators, plant growth regulators or anti-microbials. They are applied to prevent, destroy, repel, or mitigate the effects of target pests. They may be applied aerially, ground-applied, injected, chemigated, fumigated, or hand-applied. Piscicides and aquatic herbicides are applied directly to water to control nuisance or exotic fishes and aquatic weeds.

5. According to a census by USDA's National Agricultural Statistics Service, there were 2,204,792 farms and ranches in the United States in 2007, covering 922 million acres. Harvested cropland totaled 310 million acres. The market value of agricultural products for these farms was over $305 billion dollars. Using data from the National Agricultural Statistics Service Census, CropLife America --a trade association representing manufacturers of pesticides -- estimated

that in 2002, pesticides were applied on 947,000 farms. A 2005 study by the CropLife Foundation concluded that 215 million acres are treated with herbicides; and a March 2009 study concluded that 45 million acres of U.S. croplands were treated with insecticides.

6. Agricultural production requires flexibility to respond to changing and unpredictable conditions. The amounts and kinds of pesticides used by growers can vary from year to year as pest disease pressures change. Extreme weather, excessive rain, or drought, can force an agricultural producer to modify his crop plans and require adjustments to the type and amount of pesticides applied. In addition, changing market conditions and commodity prices also can cause a grower to switch crops within a year's time, which can dramatically change the mix and frequency of pesticides used.

7. The currently available NPDES permits are not likely to meet all of the demands of agriculture production. Using the aquatic noxious weed control NPDES permit in the State of Washington as an example, the permit itself is specific to only the pesticides listed on the permit, and prohibits the use of those pesticides to combat any new aquatic weed pests without a modification to the permit. For general agriculture, pest problems can develop quickly and require a prompt response. Failure to apply a pesticide soon after a pest is first detected could result in recurring and greater pest damage in subsequent years if a prolific insect were to become established in a crop or other plant hosts. Fungal spores such as soybean rust can move hundreds of miles in a few days' time via the wind or faster in the event of a hurricane. The current NPDES individual permitting and permit

modification process would hamper a farmer's ability to respond to routine crop or pesticide changes, as well as to respond quickly to emerging threats or to emergency situations. Delays in receiving an NPDES individual permit could lead to crop losses. These crop losses may not be compensated if crop insurance requires the prompt use of pesticides to mitigate risk.

8. If agricultural producers are required to apply for NPDES individual permits for pesticide use in the spring of 2009, before EPA or states issue general permits, there is likely to be widespread confusion regarding the scope of the permitting obligations. EPA and state guidance is necessary to address a multitude of specific issues ranging from the appropriate applicant (the landowner, the land-renter, or the hired pesticide applicator) to the affected bodies of water on or near the farm or forest land. Numerous farmers have already made planting decisions and purchased pesticides in reliance on the final EPA rule that provided that pesticide applications to or over, including near, waters of the United States in compliance with the Federal Insecticide, Fungicide, and Rodenticide Act did not require NPDES permits. Farmers will be fearful of citizen lawsuits permitted under the Clean Water Act.

II. Harm to USDA Programs.

9. Programs administered by USDA -- including land management activities with respect to invasive plant species, fuels reduction, and wildlife populations and habitat -- also will be subject to disruption and delay by the immediate requirement to obtain NPDES permits.

10. Just as agricultural producers must respond quickly to weather events, emerging threats, and emergency situations, USDA also must respond to

events and pest outbreaks that are unpredictable in their location and severity and may encompass several states simultaneously. Insect outbreaks in particular can erupt or change direction rapidly, requiring flexible and timely responses from land managers to limit the resulting property damage, environmental damage, and economic losses. Many USDA projects are time-sensitive.

A. **Forest Service Programs:**

Gypsy Moth and other defoliating insects: The program to suppress, eradicate, or slow the spread of the European gypsy moth in eastern states is the largest aerial spray forest operation in the United States and often occurs over or near waters of the United States. The Asian gypsy moth has been eradicated, but trapping programs are in place to detect new introductions from overseas. These pests pose major threats to hardwood forest resources and ecosystems wherever conditions favor population increases, or when they are introduced into new locations. Delays of field operations caused by immediate implementation of the NPDES permit requirement could render these programs largely ineffective.

Invasive Plant Control: Invasive plants corrupt a region's ecological processes, displacing native plants, reducing wildlife habitat, disrupting nutrient cycling, consuming more water than native plants and changing water tables. In addition, their proliferation provides powerful fuel for wildfires, increasing the likelihood of and severity of future wildfires. This year the Forest Service plans to treat at least approximately 30,000 acres of invasive plants in Oregon and Washington, alone. If a major delay occurs in the ability to apply

herbicides as planned, and on schedule, this year or in following years, these invasive species will continue to spread and increase in size. This could result in greater cost to taxpayers, and permanent loss of some habitats that cannot be effectively controlled after a delay. The Forest Service employs the aerial application of herbicides to control leafy spurge and knap weeds in the West and cheat grass in the South. These aerial applications have the potential to occur over or near waters of the United States.

Impacts to wildlife (Threatened and Endangered Species, and Game Species): The Forest Service conducts many projects to improve habitat for wildlife using vegetation treatments that include the use of herbicides applied to, over, or near waters of the United States. For example, the Forest Service cooperates with the Fish and Wildlife Service and several Florida state agencies to carefully manage herbicide applications directly into water to control invasive plant species in waterways to improve habitat for the endangered Florida Manatee.

These treatments often are time-critical, and are usually coordinated to have specific effects. If delays in obtaining appropriate NPDES permits cause the Forest Service to miss a window of opportunity to apply the herbicide, some projects could be delayed, could be less efficacious, could require either additional chemicals or mechanical treatments to compensate for the delay, with a result of increased cost, or may be cancelled altogether. The window of opportunity for an application of herbicide may sometimes be a matter of only a few weeks.

Aquatic plant control: Aquatic herbicides are used to an increasing extent for control of aquatic invasive

plants in water bodies on National Forests. Invasive aquatic plants reduce the habitat required by native animals and birds. The Forest Service makes direct applications of herbicides into water to control giant salvinia in Texas and hydrilla in the Northeast.

Other applications/general: The Forest Service and its partners use aerial applications of herbicides to maintain powerline right-of-ways, to remove woody vegetation which allows water to infiltrate hydropower facilities (dams), and to improve range conditions, among other things. These aerial applications are made over or near waters of the United States. Delays resulting from the permitting process could have broad economic impacts, such as reduction of range forage available to grazing permittees, or damage to hydropower facilities.

B. APHIS Programs

11. One of APHIS's mandates is to prevent the establishment of foreign plant or animal pests and diseases. See http://www.aphis.llsda.gov/about_aphis/. In many cases, an immediate response using pesticides is required to eradicate these quarantine threats. It is also critical that APHIS respond immediately to biosecurity emergencies that involve aerial application of pesticides. Following are some examples:

Crop Biosecurity: APHIS Plant Protection & Quarantine must be able to conduct coordinated responses to large biosecurity emergencies as reflected in the Homeland Security Presidential Directive 5, issued February 28, 2003. This directive requires that all federal departments and agencies adopt the National Incident Management System in their domestic emergency management. In the interest of Homeland Security, APHIS, and other federal

agencies, working with state partners and growers must maintain the ability to respond immediately by application of pesticides, including aerial application if necessary, to deliberate or inadvertent introductions of new pests or diseases which may threaten the biosecurity of the United States. For example, a sudden large-scale introduction of Foot and Mouth disease, wheat rust or soybean red leaf blotch could threaten the U.S. food supply. As a last resort, aerial spraying might be used, and might be over or near waters of the United States.

Exotic Fruit Fly Programs: APHIS quarantine pest eradication programs include Mediterranean, Mexican, and Oriental fruit flies, which can inflict 400 host plants including peaches, plums, apples, apricots, avocados, citrus, cherries, figs, guavas, nectarines, peppers, tomatoes and several nuts, resulting in severe economic damage. A 2002 estimate of the United States market value of the commodities that could host exotic fruit flies was $7.2 billion. These fruit flies can be introduced from imported cargo shipments. If not detected in time, a small infestation can develop into a widespread outbreak making essential a rapid response with pesticides within a matter of days before the population further multiplies, spreads and becomes permanently established in the continental United States. Florida has encountered multiple large-scale outbreaks of Mediterranean fruit flies. Aerial spraying might be used, and might be over or near waters of the United States.

Mormon Cricket and Grasshopper Outbreaks: About 40 species of grasshoppers can cause significant damage to crops and forage. Grasshopper and Mormon cricket outbreaks in 2001 caused an estimated $25

million in damage to crops in Utah alone, but outbreaks have historically occurred throughout 17 western states. In 2009, 96 million acres in the Western States have elevated populations of grasshoppers. There is an annual need to apply pesticides aerially to reduce pest damage for Western farmers and ranchers, and some of this aerial spraying likely will occur over or near waters of the United States.

Zoonotic Outbreaks - The ruling will significantly affect APHIS's ability to respond to a mosquito borne zoonotic disease outbreak such as Rift Valley fever virus, which is a threat to livestock as well as to humans. Larvicide treatments directly into water would be curtailed enabling the larvae to emerge as adult mosquitoes which are vectors of the virus and spread the disease. Aerial applications over wide areas also would be affected if there were a need to identify and avoid all bodies of water. APHIS would likely be limited to treating only isolated strips of land, not only making it difficult for aircraft to fly those patterns, but also likely rendering the eradication effort ineffective.

C. **Agricultural Research Service**

12. USDA's Agricultural Research Service conducts research programs throughout the fifty states and in U.S. territories, some of which are located close to waters of the United States. The research programs can include application of pesticides and/or biological control agents as either a component of conventional agricultural production systems or as an experimental treatment in a scientific trial. If these programs were subject to an immediate NPDES permit requirement, the Agricultural Research Service would have to suspend these applications near water until proper permits could be obtained. This could seriously

jeopardize on-going research trials, some of which are multi-year trials. An interruption in the experimental plan could compromise the integrity of the experiment, requiring the experiment to be repeated after the newly required permits are in place. This could result in a loss of the resources already invested in the trial and a delay in critical new information and technologies to solve high priority agricultural problems.

13. The Agricultural Research Service research programs involving direct applications of pesticides into water and aerial applications over water for the control of mosquitoes and biting flies would be halted to the detriment of public health and livestock efforts. Direct applications of pesticides to water for Agricultural Research Service's aquaculture research efforts would similarly be halted.

III. Conclusion

14. The immediate application of the NPDES permitting requirements, pursuant to this Court's decision, will disrupt American farmers' and USDA agencies' ability to conduct not only routine business, but also will compromise their ability to respond efficiently and effectively to emerging threats and emergency situations. Time is necessary for both agricultural producers and USDA agencies to determine the type of permits their activities will require, and to allow EPA and the states to issue appropriate NPDES permits.

I declare under penalty of perjury that the foregoing is true to the best of my knowledge and belief.

Dated this 7th day of April 2009.

/s/ Teung F. Chin, PhD
Teung F. Chin, PhD
Acting Director
Agricultural Research
Service
Office of Pest Management
Policy

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE NATIONAL COTTON COUNCILOF AMERICA,	) No. 06-4630) and consolidated
Petitioner,	) Nos. 07-3180, 07-
v.	) 3181. 07-3182,
U.S. ENVIRONMENTAL PROTECTION AGENCY and	) 07-3183, 07-3184) 07-3185, -073186,
LISA P. JACKSON, Administrator,	) 07-3187, 07-3191,) and 07-3236
Respondents.	)

DECLARATION OF ERIK S. ANDERSON

I, Erik S. Anderson, declare that the following statements are true and correct to the best ofmy knowledge, infonnation and belief, and are based on my personal knowledge and infonnation supplied to me by employees of the United States Coast Guard operating under the Coast Guard's Aids to Navigation Program.

1. I am the U.S. Coast Guard Visual Navigation Program Manager responsible for providing policy oversight for the Coast Guard's Short Range Aids to Navigation Program. In this capacity, I administer and supervise the operation and routine maintenance of the United States aids to navigation system, which is comprised of approximately 50,000 federal aids located

throughout the United States and territories, including approximately 10,000 river-miles within the Mississippi River and Columbia River systems.

2. I have served on active duty in the U.S. Coast Guard for approximately 20 years. I have been involved directly in the aids to navigation mission for approximately 13 of these years, including performing duties as a Commanding Officer of a Coast Guard sea-going buoy tender directly responsible for servicing aids to navigation. I have served as the visual navigation program manager for approximately 2 years. I am a graduate of the United States Coast Guard Academy and hold master degrees in business administration and operations research. I also hold a license as a master mariner of vessels of any gross tons operating upon ocean and near coastal routes.

3. One of the United States Coast Guard's primary missions involves contributing to marine safety by providing reliable aids to navigation to assist mariners. In order to further navigational safety and meet minimum thresholds of due care, the Coast Guard must ensure the availability and reliability of established maritime aids to navigation. Short range aids to navigation include buoys, beacons, and light structures. Beacons and light structures may be located either on land or in the water.

4. The Coast Guard uses EPA-approved pesticides in two circumstances associated with its maintenance of aids to navigation. In both these circumstances, the Coast Guard anticipates that pesticides applied in and around aids to navigation may result in excess or residual pesticides being discharged to waters of the United States.

5. Coast Guard personnel must provide periodic

maintenance service to ensure the reliability of aids to navigation signals (e.g. light and/or daymark) and respond when aids to navigation outages occur. Because stinging insects (e.g., wasps) frequently nest on or near the structures that Coast Guard personnel must access for servicing, the use of insecticides for protection is required.

6. In addition, aids to navigation occasionally become obscured by overgrown vegetation on, and in the area surrounding, aids to navigation structures. To ensure these aids remain visible to mariners, the Coast Guard routinely utilizes manual brushing methods to remove obscuring vegetation. The density of poisonous plants (e.g., poison ivy) in the vicinity of an aid to navigation has, however, required the use of pesticides in the past because Coast Guard members have had severe and debilitating reactions to poisonous plants when clearing brush manually. When using pesticides in such situations, the Coast Guard uses commercially available pesticides approved by the United States Environmental Protection Agency (EPA). In order to provide for the safety of Coast Guard servicing personnel, it is important that the use of pesticides remain an option to be used as necessary.

7. The Coast Guard previously relied on the interpretations of the United States Environmental Protection Agency and State permitting authorities, which determined that the use of pesticides in accordance with FIFRA are generally not subject to Clean Water permit requirements. As a result, the Coast Guard does not possess Clean Water Act permits that authorize the discharge of pesticides to waters of the United States in connection with maintenance of Aids-to-Navigation. Without Clean Water Act

permits, the Coast Guard may not be able to maintain all of its aids to navigation. The Coast Guard's inability to apply pesticides could lead to a reduction in the availability and reliability of the inland aid to navigation system, thereby increasing transit risks and reducing waterway capacity.

I declare under penalty of perjury that the foregoing is true and correct, based on my personal knowledge and on information provided to me by employees of the United States Coast Guard under my policy oversight.

Dated this 10th day of April, 2009

/s/ Erik S. Anderson
Erik S. Anderson,
Commander, U.S. Coast Guard

No. 06-4630 (and consolidated cases)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE NATIONAL COTTON COUNCIL OF AMERICA, et al.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for Review of Final Action of the United States Environmental Protection Agency

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RESPONDENT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE TO PETITION FOR REHEARING EN BANC

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June 3, 2009

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In accordance with this Court's request, the United States Environmental Protection Agency ("EPA") responds to the Respondent- Intervenors' petition for rehearing en banc.

INTRODUCTION

EPA argued before this Court that ambiguity exists in the Clean Water Act's definition of "pollutant" in the context of pesticide applications to or over, including near, waters of the United States. Although the Court did not defer to EPA's interpretation of this ambiguous statutory term, EPA decided not to seek rehearing en banc because it did not believe the Panel's decision involved a question that justified rehearing en banc under the standards of Fed. R. App. P. 35.

Respondent-Intervenors seek rehearing based on an overly broad reading of the Panel's opinion. This case presented for judicial review an EPA rule (the "Final Rule") addressing the application of pesticides to or over, including near, waters of the United States in two specific circumstances. 71 Fed. Reg. 68,483 (Nov. 27, 2006). Although the Panel's opinion contains certain statements that some could try to read to

expand significantly (and improperly) the regulatory scope of the Clean Water Act's

National Pollutant Discharge Elimination System ("NPDES") permit program, EPA believes that the Panel's statements should be read as being limited to the issues that were before it: pesticide applications to or over, including near, waters of the United States that were addressed by the Final Rule. Properly read this way, EPA believes it can conform its conduct to comply with the Panel's decision, as EPA articulated in its separate Motion for Stay of Mandate. The Motion for Stay of Mandate requests the Court to stay issuance of the mandate in this case for 24 months to allow EPA and NPDES-authorized States time to develop and issue NPDES permits to authorize pesticide discharges to waters consistent with Clean Water Act requirements.

DISCUSSION

The Panel's opinion should be read as deciding only those issues presented for its review under the Clean Water Act and Administrative Procedure Act. The petitioners in this case challenged an EPA rule that addressed the discharge of pesticides in compliance with the Federal Insecticide, Fungicide, and Rodenticide Act to waters of the United States in two specific circumstances: (i) the discharge of pesticides directly to waters to control pests; and (ii) the application of pesticides to control pests that are present over waters of the United States, including near such waters, where a portion of the pesticides will unavoidably be deposited to waters of the United States in order to target the pests effectively. 71 Fed. Reg. 68,483, 68,485 (Nov. 27, 2006). This Court's role is limited to determining whether this Final Rule is

arbitrary, capricious, an abuse of discretion or contrary to law. 5 U.S.C. § 706. It may set aside the rule if it finds it unlawful, but may venture no further. *See FPC v. Idaho Power Co.*, 344 U.S. 17, 20 (1952) ("the function of the reviewing court ends when an error of law is laid bare"); *PPG Industries, Inc. v. United States*, 52 F.3d 363, 365 (D.C. Cir. 1995) (same). The Court does not have authority to issue binding legal opinions outside the scope of the rule under review. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (relief under the Administrative Procedure Act focuses on the challenged decision, not on the agency's activities as a whole).

Respondent-Intervenors offer in their petition for rehearing an overly broad reading of the opinion that reaches far beyond the limited issues presented by the Final Rule. Respondent-Intervenors focus on the portion of the opinion that seems to suggest a "but for" test to determine when the addition of a pollutant is from a point source. Respondent-Intervenors' Petition at ii, 7-8, 13. They argue that this "but for" test "would sweep into the NPDES permitting program virtually any industrial, commercial, recreational, residential or personal activity that can be identified as a 'but for' cause of future pollution to waters." Respondent-Intervenors' Petition at 7-8. By latching onto this 'but for' phrase in the decision, Respondent-Intervenors predict that any substance that at any prior time was released from a point source may now trigger a requirement to obtain NPDES permit coverage. This broad reading of the opinion enables Respondent-Intervenors to claim the decision is of exceptional importance and merits en banc review.

An appropriately narrow reading of the opinion avoids this dilemma. The Panel's "but for" discussion occurs in the context of the pesticide applications addressed by the Final Rule. Specifically, the Panel offered a "but for" standard in the context of pesticide applications to or over, including near, waters of the United States, where the act of discharging the pesticide and the presence of the residual or excess pesticides in the water are both temporally and geographically close. *See Nat'l Cotton Council v. EPA*, 553 F.3d 927, 940 (6th Cir. 2009) ("but for the application of the pesticide, the pesticide residue and excess pesticide would not be added to the water; therefore, the pesticide residue and excess pesticide are from a 'point source.'") The Panel was simply not presented with, and therefore did not address, any question of whether such a "but for" test should apply to other, geographically or temporally dissimilar contexts, such as automobile tailpipe emissions or applications of lawn fertilizer, where a significant amount of time may pass between the release of a substance and its eventual entry into a water of the United States or where there may be one or more intervening mechanisms of transport or conveyance. *See* Respondent- Intervenor's Petition at 8. EPA has never interpreted the Clean Water Act's NPDES program in such a broad fashion, and it does not read the Panel's opinion as establishing the new, expansive scope of Clean Water Act NPDES permit coverage that Respondent-Intervenors anticipate.

The Panel's opinion also briefly ventures into the area of terrestrial applications of pesticides but, again, Respondent-Intervenors base their petition on an expansive rather than appropriately narrow reading of

the Panel's statements. *See* Respondent-Intervenor's Petition at 13-14. The Final Rule expressly did not address terrestrial applications of pesticides. 71 Fed. Reg. at 68,486 (Final Rule does not address "applications of pesticides to terrestrial agricultural crops"); 68,488 ("EPA does not believe it is appropriate to broaden the scope of the regulation to include additional types of pesticide applications at this time.")

EPA does not believe that the one paragraph in the opinion discussing terrestrial application of pesticides somehow removes statutory exemptions from NPDES permitting requirements set forth in the Clean Water Act. The Panel's opinion suggests that terrestrial pesticide applications that later affect waters meet the Clean Water Act's definition of "chemical waste." *Nat'l Cotton Council*, 553 F.3d at 936-37. This one statement, however, should not place into doubt long-standing statutory and regulatory standards applicable to pollutants contained in runoff from agricultural and forest lands. For example, Congress expressly exempted return flows from irrigated agriculture and agricultural storm water discharges from NPDES permit requirements even if they may contain residual pesticides from terrestrial applications. *See* 33 U.S.C. §§ 1342(l)(1); 1362(14). All parties -- Respondent-Intervenors, Environmental Petitioners, and EPA -- agree that the Panel's decision should not, and cannot, extend NPDES permit requirements to these exempt activities. Respondent-Intervenors' Petition at 13-14; Environmental Petitioner's Response at 2; EPA Motion for Stay of Mandate at 4, note 2. Thus, the Panel's reference to terrestrial application of pesticides beyond the scope of the two circumstances in the Final

Rule -- an issue not presented by the Final Rule under review -- should not justify rehearing en banc.

EPA agrees with Respondent-Intervenors that the Panel's decision to vacate the Final Rule will cause significant disruption among the hundreds of thousands of persons and businesses nationwide who apply pesticides to or over, including near, waters of the United States without NPDES permits and now, as a result of the Panel's decision, will need to obtain permits in order to continue doing so consistent with the Clean Water Act. *See* Respondent-Intervenors' Petition at iii. As EPA explained in its Motion for Stay of Mandate, this new permitting requirement will result in substantial disruption to permitting authorities and pesticide applicators if the mandate issues before appropriate NPDES permits are available. This disruption, however, should not require en banc review of the Panel decision. In order to avoid the disruption to permitting authorities, mosquito abatement programs, farmers, foresters, and others, EPA has requested the Court to exercise its equitable discretion and stay its mandate until April 9, 2011 to allow EPA and authorized permitting authorities sufficient time to develop and issue Clean Water Act permits containing appropriate terms to govern the discharge of pesticide pollutants to waters of the United States.

Respectfully submitted,

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Nos. 09-533 and 09-547

In the Supreme Court of the United States

CROPLIFE AMERICA, ET AL., PETITIONERS

v.

BAYKEEPER, ET AL.

AMERICAN FARM BUREAU FEDERATION, ET AL., PETITIONERS

v.

BAYKEEPER, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI FOR THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

This case involves a challenge to a regulation promulgated by the Environmental Protection Agency (EPA). The EPA's responsibilities include the administration of both the Clean Water Act (CWA) and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The challenged EPA rule interpreted the CWA not to require permits for the application of pesticides, in a manner consistent with the relevant requirements of the FIFRA, either directly to waters of the United States or over, including near, such waters to control pests. The question presented is as follows:

Whether the court of appeals erred in concluding that the text of the CWA unambiguously foreclosed EPA's rule.

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 553 F.3d 927.[1]

[1] References to "Pet. App." are to the appendix to the petition for a writ of certiorari filed in No. 09-533.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 2009. A petition for rehearing was denied on August 3, 2009 (Pet. App. 64a-65a). The petitions for a writ of certiorari were filed on November 2, 2009 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Since the enactment of the Clean Water Act (CWA or Act), 33 U.S.C. 1251 *et seq.*, in 1972, the Environmental Protection Agency (EPA) has not required persons applying pesticides directly to or over waters of the United States for the purpose of controlling pests to obtain a CWA permit. That longstanding practice was codified in the 2006 EPA final rule at issue in this case. Pet. App. 26a-63a.

a. CWA Section 301(a) states that "the discharge of any pollutant by any person shall be unlawful" unless the discharge is in compliance with certain other provisions of the Act. 33 U.S.C. 1311(a). The Act defines the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12). The Act defines the term "pollutant," in turn, as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. 1362(6). A "point source" is a "discernible, confined and discrete conveyance." 33 U.S.C. 1362(14).

The primary way that a person may discharge a pollutant without running afoul of the Act is to obtain a per-

mit pursuant to CWA Section 402, 33 U.S.C. 1342, which establishes the National Pollutant Discharge Elimination System (NPDES). Subject to certain conditions, EPA and approved States "may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants." 33 U.S.C. 1342(a)(1). In addition to individual NPDES permits, EPA issues general permits that can cover entire classes of discharges by similarly situated dischargers. Dischargers who comply with the terms of the general permit, including specified technology and water-quality-based effluent limitations, do not require individual permits for any discharges within the covered class. 40 C.F.R. 122.28.

Congress authorized EPA to promulgate regulations to administer the NPDES program. 33 U.S.C. 1361(a). EPA regulations include a list of discharges that do not require NPDES permits. 40 C.F.R. 122.3.

b. Three days after Congress enacted the CWA, it passed comprehensive amendments to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), Pub. L. No. 92-516, 86 Stat. 973, which regulates the sale, distribution, and use of pesticides through a registration program. Before registering a pesticide, EPA must determine, *inter alia*, that the pesticide "will perform its intended function without unreasonable adverse effects on the environment," and that "when used in accordance with widespread and commonly recognized practice [the pesticide] will not generally cause unreasonable adverse effects on the environment." 7 U.S.C. 136a(c)(5). FIFRA defines the term "unreasonable adverse effects on the environment" to include "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and

benefits of the use of any pesticide," including water-quality and other ecological effects. 7 U.S.C. 136(bb). If there are risks of concern, EPA considers which mitigation measures (*e.g.*, establishing a buffer between the area sprayed and a water body, or lowering the proposed application rate to reduce toxicity to non-target species) are necessary to reduce those risks. In performing the FIFRA analysis, EPA examines, *inter alia*, the ingredients of a pesticide, the intended type of application site and directions for use, and supporting scientific studies. 7 U.S.C. 136a(c); see 40 C.F.R. Pts. 152, 156, 158.

2. Since 2000, several cases in the Second and Ninth Circuits have raised the question whether the CWA requires NPDES permits for certain pesticide applications. Although the Ninth Circuit held in two cases that a pesticide applicator was required to obtain an NPDES permit, neither decision contained a square holding interpreting the term "pollutant" in a manner inconsistent with the EPA rule that is at issue in this case. See *Headwaters, Inc.* v. *Talent Irrigation Dist.*, 243 F.3d 526, 532-533 (2001) (determining chemical residue from herbicide application to be a pollutant, but without analyzing whether it constituted point-source pollution); *League of Wilderness Defenders/Blue Mountains Biodiversity Project* v. *Forsgren*, 309 F.3d 1181, 1184 n.2 (2002) (assuming that the parties did not dispute that insecticide applied above navigable waters qualified as a pollutant); see also Pet. App. 49a-51a. In 2005, the Ninth Circuit, relying in part on EPA's interim interpretation, held that chemical "pesticides that are applied to water for a beneficial purpose and in compliance with FIFRA, and that produce no residue or unintended effects, are not 'chemical wastes,' and thus are not 'pollut-

ants' regulated by the CWA." *Fairhurst* v. *Hagener*, 422 F.3d 1146, 1150-1151 (2005). Neither of the pertinent Second Circuit decisions reached the merits of the question presented in this case, let alone foreclosed EPA from interpreting the Act not to require permits for the type of pesticide applications at issue. Indeed, one of those decisions essentially called on EPA to resolve the issue. See *Altman* v. *Town of Amherst*, 47 Fed. Appx. 62, 67 (2002) ("Until the EPA articulates a clear interpretation of current law—among other things, whether properly used pesticides released into or over waters of the United States can trigger the requirement for NPDES permits * * * —the question of whether properly used pesticides can become pollutants that violate the CWA will remain open."); *No Spray Coalition, Inc.* v. *City of New York*, 351 F.3d 602, 605-606 (2003) (reserving the "complex question" whether a pesticide application to waters of the United States constitutes a CWA discharge of a pollutant).

Taken together, those decisions created uncertainty among the regulated community and other affected citizens about the applicability of the NPDES permit program to certain pesticide applications. Pet. App. 30a-32a. In 2003, EPA sought to resolve that uncertainty by addressing the issue administratively. See 68 Fed. Reg. 48,385 (2003). In an Interim Statement and Guidance, EPA identified two circumstances for which it had concluded that pesticides applied to waters of the United States consistent with all relevant requirements of FIFRA are not "pollutants" under the CWA and therefore do not require an NPDES permit. *Id.* at 48,387. The first circumstance was the application for pest-control purposes of pesticides directly to waters protected by the CWA. *Ibid.* The second circumstance was the

application of pesticides to control pests that are present over waters of the United States where the application results in a portion of the pesticides being deposited to covered waters. *Ibid.*

EPA solicited public comment on the Interim Statement and Guidance. 68 Fed. Reg. at 48,385. After considering the public comments, EPA issued a final Interpretive Statement confirming its interim position. 70 Fed. Reg. 5095-5096 (2005). At the same time, EPA published notice of a proposed rulemaking to incorporate the substance of the Interpretative Statement into EPA regulations, and it solicited public comment on the proposed rulemaking. *Id.* at 5093.

On November 27, 2006, EPA issued its final rule. 71 Fed. Reg. 68,483. The rule revised EPA's NPDES regulations to add a paragraph to the list of discharges in 40 C.F.R. 122.3 that do not require NPDES permits. 71 Fed. Reg. at 68,492. The rule covered the application of pesticides, "consistent with all relevant requirements under FIFRA (*i.e.*, those relevant to protecting water quality)," in the following two circumstances:

1. The application of pesticides directly to waters of the United States in order to control pests. Examples of such applications include applications to control mosquito larvae, aquatic weeds, or other pests that are present in waters of the United States.

2. The application of pesticides to control pests that are present over waters of the United States, including near such waters, where a portion of the pesticides will unavoidably be deposited to waters of the United States in order to target the pests effectively; for example, when insecticides are

> aerially applied to a forest canopy where waters of the United States may be present below the canopy or when pesticides are applied over or near water for control of adult mosquitoes or other pests.

Ibid. (40 C.F.R. 122.3(h)).

EPA further concluded that "if there are residual materials resulting from pesticides that remain in the water after the application and its intended purpose (elimination of targeted pests) have been completed, these residual materials are * * * pollutants under CWA section 502(6) because they are wastes of the pesticide application." 71 Fed. Reg. at 68,487. EPA explained, however, that such applications "do not require NPDES permits" because, "while the discharge of the pesticide is from a point source (generally a hose or an airplane), it is not a pollutant at the time of the discharge. * * * Instead, the residual should be treated as a nonpoint source pollutant." *Ibid.*

3. After various parties petitioned for review of EPA's rule in 11 different courts of appeals, the petitions were consolidated in the Sixth Circuit. Applying the principles set forth in *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984), the court of appeals vacated the rule. Pet. App. 1a-25a.

a. The court of appeals stated that the first question under *Chevron* is whether the CWA unambiguously includes pesticides within its definition of "pollutant." Pet. App. 14a. The court interpreted the term "chemical waste," part of the Act's definition of "pollutant," to include discarded, superfluous, or excess chemicals. *Id.* at 16a. Applying that interpretation, the court concluded that so long as a chemical pesticide is intentionally applied to waters to perform a useful purpose and leaves

no excess portions after performing its intended purpose, it is not a "pollutant" and therefore does not require an NPDES permit. *Ibid.* At the same time, the court concluded that excess chemical pesticide and pesticide residue—*i.e.*, any portions of the pesticide that remain in the water after the pest-control purpose has been served—"unambiguously fall within" the term "chemical waste" and therefore are "pollutant[s]" under the CWA. *Id.* at 16a-18a.

EPA had recognized that excess or residual portions of a discharged pesticide are "pollutant[s]" within the meaning of the CWA. The agency had concluded, however, that the application of a pesticide that leaves such a residue does not require a CWA permit because such portions are neither excess nor residual (and therefore are not "pollutant[s]") at the time of the discharge. EPA contended that such residues are properly viewed as non-point source pollutants. The court of appeals rejected that conclusion, finding it contrary to the CWA's plain language and purpose. The court held that, when pesticide discharges result in the entry of excess or residual portions into waters of the United States, those discharges require a permit because excess or residual pesticides are pollutants discharged from a point source, as they are introduced into the water by the applicator from a point source. Pet. App. 21a-24a.

b. The court of appeals also addressed the question whether the term "biological materials," another component of the CWA definition of "pollutant," includes biological pesticides applied to control pests. Pet. App. 18a-20a. Citing the dictionary definition of "material," the court concluded that the "plain, unambiguous nature" of the statutory text compelled the conclusion that biological pesticides qualify as biological materials. *Id.*

at 18a-19a. The court of appeals also relied on Congress's use of the term "biological *materials*," rather than "biological *wastes*," to justify the court's different treatment of biological and chemical pesticides. *Id.* at 19a-20a (emphasis added).

4. EPA moved to stay the mandate for two years in order to avoid significant disruption to (i) EPA and those States that administer NPDES permit programs, and (ii) the thousands of persons and businesses nationwide who apply pesticides to or over, including near, waters protected by the CWA. EPA explained that the stay would provide it and state permitting authorities time to develop and issue general CWA permits containing appropriate terms to govern the discharge of pesticides to covered waters in a more administratively workable manner. Pet. App. 105a-123a. The court of appeals granted EPA's motion and stayed issuance of the mandate until April 9, 2011.

ARGUMENT

Petitioners contend that the court of appeals disregarded settled principles governing the deference owed to agency interpretations, and that the court's construction of the CWA is in tension with decisions of this Court and other courts of appeals. 09-533 Pet. 14-22; 09-547 Pet. 13, 20, 25-28. Although the government agrees that the court of appeals misapplied *Chevron* to EPA's 2006 rule, the Sixth Circuit's ruling does not conflict with any decision of this Court or another court of appeals. And while the decision below potentially applies to thousands of applications of pesticides to or over, including near, waters protected by the CWA, the court of appeals' two-year stay of its mandate has provided time to EPA and authorized States to mitigate the administrative burdens

resulting from the decision. Indeed, EPA is currently in the process of developing general permits governing the types of pesticide applications covered by its rule. Further review is therefore unwarranted.

1. Although the court of appeals recited the correct standard of review under *Chevron* (Pet. App. 9a-10a), it misapplied that standard to EPA's rule. Contrary to the court of appeals' conclusion, the relevant CWA terms do not unambiguously foreclose EPA's interpretation. Congress defined the term "pollutant" to encompass 16 specific items. 33 U.S.C. 1362(6); see p. 2, *supra*. None of the 16 items clearly encompasses pesticides applied to waters, in a manner consistent with FIFRA requirements, in order to control pests. In particular, Congress's use of the terms "chemical wastes" and "biological materials" does not indicate a clear intent to cover the application of pesticides to covered waters under the circumstances specified in EPA's rule.

a. Although the court of appeals viewed the term "chemical waste" as unambiguous and therefore did not rely on EPA's interpretation as reflected in the 2006 regulation, the court's construction of that term with respect to chemical pesticides is consistent with EPA's rule. Both EPA and the court of appeals determined that pesticides intentionally applied to or over, including near, water to perform a particular useful purpose (*i.e.*, control pests) are not chemical wastes if they leave no residue after performing their intended purpose. See 71 Fed. Reg. at 68,487; Pet. App. 16a-17a. Both EPA and the court further concluded that any pesticide residue remaining in the water after the intended purpose has been served constitutes "chemical waste" and is therefore a "pollutant" within the meaning of the CWA. *Ibid.*

The court of appeals departed from EPA's 2006 rule, however, when it concluded that the CWA unambiguously classifies excess or residual pesticide as a pollutant discharged from a point source. The court of appeals stated that "it is clear that under the meaning of the Clean Water Act, pesticide residue or excess pesticide * * * is a pollutant discharged from a point source because the pollutant is introduced into a water from the outside world by the pesticide applicator from a point source." Pet. App. 23a-24a (internal quotation marks omitted). The court rejected EPA's conclusion that, because such an excess or residue becomes a "chemical waste" (and therefore a "pollutant") only at some time after discharge, it should be treated as a nonpoint source pollutant. Compare *id.* at 21a-25a, with 71 Fed. Reg. at 68,487; see p. 7, *supra*.

Thus, the critical question is whether the portion of a chemical pesticide that ultimately becomes excess or residue is a "pollutant" at the time it is released from the point source, or whether it becomes a "pollutant" only after the pesticide has served its intended purpose and the excess takes on the character of "waste." The court of appeals identified no provision of the CWA that speaks directly to that question. The court's conclusion that the CWA unambiguously foreclosed EPA's interpretation—notwithstanding the Act's silence as to the temporal issue of when such pesticide loses its character as product and becomes a pollutant; EPA's past practice of not requiring permits for such discharges (p. 2, *supra*); and FIFRA's specific regulation of pesticide use (pp. 3-4, *supra*)—reflects an erroneous application of *Chevron*.

b. The court of appeals also erred in holding, contrary to EPA's rule, that the CWA term "biological ma-

terials" unambiguously encompasses biological pesticides. Pet. App. 18a-20a. As the Ninth Circuit previously concluded, the CWA is ambiguous on whether that term, read in conjunction with the other items specified in the definition of "pollutant," includes *all* biological material (waste or not) within its scope. See *Association to Protect Hammersly, Eld, & Totten Inlets* v. *Taylor Resources, Inc.*, 299 F.3d 1007, 1016 (2002) (holding that natural byproducts of live mussels grown on harvesting rafts were not "biological materials"). The court below nevertheless found clear congressional intent to include biological pesticides within the term "biological materials," even though few biological pesticides existed at the time Congress adopted this definition. Compare Pet. App. 18a-19a, with 71 Fed. Reg. at 68,486. The court of appeals' decision also creates the peculiar result that, although a chemical pesticide (except for excess or residue) applied to waters for pest control is not a "pollutant," a biological pesticide applied to the same waters in the same manner for the same purpose is a "pollutant." That result is particularly anomalous in light of EPA's assessment that biological pesticides generally pose less serious adverse environmental consequences than chemical pesticides. *Ibid.*; see Valent Biosciences Amicus Br. 11-12.

c. Notwithstanding the court of appeals' errors, the decision below does not warrant this Court's review. The court of appeals recited the correct standard under *Chevron* and did not purport to articulate a new analytic framework for review of agency rules. Pet. App. 9a-10a. The result below does not conflict with a decision of this Court or any other court of appeals. The court below was the first to review the validity of EPA's 2006 final rule, and no court of appeals has held that pesticide ap-

plications to navigable waters resulting in chemical residue or involving biological pesticides do not require an NPDES permit. See pp. 4-5, *supra*. And, as explained below (pp. 15-16, *infra*), EPA is in the process of fashioning a regulatory response to mitigate the impact of the court of appeals' decision.

2. In addition to challenging the court of appeals' application of *Chevron* principles to EPA's rule, petitioners in No. 09-533 contend that the court's interpretation of the CWA term "chemical waste" conflicts with this Court's decision in *Burlington Northern & Santa Fe Railway* v. *United States*, 129 S. Ct. 1870 (2009), and with the Second Circuit's decision in *Cordiano* v. *Metacon Gun Club, Inc.*, 575 F.3d 199 (2009). Pet. 17-22. Petitioners' reliance on those decisions is misplaced.

In *Burlington Northern*, the Court interpreted the phrase "arrange for disposal" as used in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). Specifically, the Court held that a manufacturer had not "arrange[d] for disposal" of pesticide that had spilled during its transfer from the delivery truck to the customer's storage tanks. 129 S. Ct. at 1875-1879. Relying on the intent element implicit in the CERCLA term "arrange for," the Court explained that the manufacturer had not entered into the transaction with "the intention that at least a portion of the product be disposed of during the transfer process." *Id.* at 1880.

Although the purpose of a pesticide discharge is relevant to whether the discharge involves a "chemical waste" within the meaning of the CWA, this Court's decision in *Burlington Northern* does not speak directly to the question presented here. As discussed above (pp. 10-11, *supra*), the Sixth Circuit *agreed* with EPA's con-

clusion, as reflected in the 2006 rule, that chemical pesticides do not constitute "chemical waste" within the meaning of the CWA unless some excess or residue remains after the pesticide has accomplished its intended purpose. And nothing in *Burlington Northern* sheds meaningful light on whether such excess or residue has been discharged into covered waters from a point source. Moreover, the ultimate question whether there has been a "discharge of any pollutant" under the CWA differs on its face from the question whether someone has "arrange[d] for disposal" of a pollutant under CERCLA. For example, the spilled pesticide at issue in *Burlington Northern*, like the excess or residual pesticide discussed in the EPA rulemaking and in the decision below, would constitute a "pollutant" within the meaning of the CWA if it had been spilled into waters of the United States.

In *Metacon Gun Club*, the Second Circuit addressed a part of the definition of "solid waste" in the Resource Conservation and Recovery Act of 1976 (RCRA)— specifically the term "discarded material," which RCRA regulations define as "abandoned" by being "[d]isposed of." 575 F.3d at 206-207 (citations omitted). The plaintiffs had brought claims under both RCRA and the CWA arising from alleged lead contamination attributable to the firing of bullets at a shooting range. *Id.* at 202. The Second Circuit first determined under RCRA that lead shot used at a shooting range is not a "discarded material" and therefore is not a solid waste. *Id.* at 207-209. Petitioners emphasize the Second Circuit's inquiry into the ordinary, intended use of a product. 09-533 Pet. 20-21. As noted above, however, the Sixth Circuit's construction of the term "chemical waste" in the CWA is consistent with that in the EPA rule. In any event, the

Second Circuit did not reject the plaintiffs' CWA claims on the ground that lead shot used for its intended purposes is not a "pollutant." Rather, the court found no CWA liability for independent reasons, explaining that the plaintiffs had not established that certain discharges were from a point source or that other discharges were into waters of the United States. *Metacon Gun Club*, 575 F.3d at 222-225.

3. In arguing that the decision below warrants further review, petitioners emphasize the potentially widespread impact of the court of appeals' ruling. 09-533 Pet. 28-33; 09-547 Pet. 14-20. The court of appeals' decision will make the NPDES permitting regime applicable to thousands of pesticide applications that were not previously subject to CWA requirements. Pet. App. 106a-107a, 126a-127a. But because the court of appeals has stayed its mandate for two years to enable EPA and authorized States to develop and issue general permits, the regulatory burdens of the court of appeals' decision will be reduced.

Immediate issuance of the mandate by the court of appeals likely would have caused significant disruption to both regulators and the regulated community. EPA and the States that administer the NPDES program lack the resources to issue individual permits in a short timeframe. Without NPDES permits and without a stay of the mandate, the many persons and businesses nationwide who apply pesticides to or over, including near, waters of the United States would have faced a choice between ceasing such applications or risking CWA violations.

For that reason, the government sought a stay of the mandate from the court of appeals. As the government explained at the time, EPA and authorized States plan

to create NPDES permits to cover a large number of similarly situated dischargers in lieu of issuing an individual permit to each discharger for the type of pesticide applications addressed in EPA's rule. Pet. App. 127a-128a. EPA estimated that the development and issuance of general permits would take two years, and it therefore requested a stay of the mandate until April 9, 2011. *Id.* at 128a-129a.

The court of appeals' grant of that motion mitigates the potentially adverse consequences of its decision. The two-year period should provide EPA and other authorized permitting agencies sufficient time to develop and issue general CWA permits to cover the activities at issue. In light of the Sixth Circuit's stay of the mandate, there is no pressing need for this Court's review.[2]

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[2] Petitioners also suggest that the opinion below could be read to extend the CWA's coverage to discharges having a more attenuated connection to waters of the United States than the discharges addressed in EPA's 2006 rule. 09-533 Pet. 29-30; 09-547 Pet. 15-17. The possibility that future plaintiffs might invoke the Sixth Circuit's decision in substantially different (and currently hypothetical) factual circumstances does not independently warrant this Court's review. In any event, the opinion below is better read as limited to the issues actually before the court of appeals: pesticide applications to or over, including near, waters of the United States that are covered by EPA's rule.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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COUNTER STATEMENT OF QUESTIONS PRESENTED

Was the Sixth Circuit correct in concluding that the Clean Water Act disallows an administrative rule purporting to exempt from the Act's permitting scheme certain point source discharges of pesticides directly to or over waters of the United States, in light of the plain language, purpose, structure, and history of the Act?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents Baykeeper, et al., with the exception of Saint John's Organic Farm, state that they are all nonprofit corporations that have no parent corporations or publicly held stock. Saint John's Organic Farm states that it has no parent corporations or publicly held stock.

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COUNTER STATEMENT OF THE CASE

Although Petitioners CropLife America, *et al.*, ("CropLife") and American Farm Bureau Federation, *et al.*, ("AFBF") labor mightily to characterize the Sixth Circuit's opinion below as worthy of review, this case has none of the important indicia of one meriting a grant of *certiorari*.

The case involves a straightforward issue of federal statutory construction – the meaning of "discharge of a pollutant" under the Clean Water Act ("CWA" or "the Act") – and whether this phrase clearly indicates that the direct release of potentially toxic pesticides into waters of the United States is to be governed by the Act's permitting program. In answering this question, the court below did not "flout" the *Chevron* doctrine, AFBF Pet. 13, ignore "contextual evidence or legislative history," CropLife Pet. 15, or "trample[ ] settled principles of judicial review," AFBF Pet. 20. Rather, it looked to the Act's own definitions of the key terms, interpreted the words in those definitions in accordance with their ordinary meaning, and then confirmed that the result was consistent with the purpose, structure, and history of the Act. Using this approach, the Sixth Circuit found that the Act's definition of "pollutant" plainly includes the excess and residual chemical and biological pesticides at issue, that these substances are added to water from the outside world by identifiable "point sources," and that the Environmental Protection Agency ("EPA") rule insulating such discharges from the Act's permit program was inconsistent both

with the plain language of the statute and with its underlying purpose.

The Sixth Circuit's opinion is perfectly in line with more than 35 years of federal jurisprudence addressing the purview of the Act's permit program generally, and its specific holding that certain point source pesticide discharges to waters of the United States are subject to the Act's permitting requirements is in accord with the holdings of three separate panels of the Ninth Circuit. Moreover, the Sixth Circuit's primary analysis is consistent with all but one of the statutory interpretations offered by EPA in the preamble to the rule. And on that one interpretation, as the court noted, EPA had departed not only from the plain language of the statute, but also from what the agency itself had recently characterized as "EPA's longstanding position." CropLife Pet.App. 23a.

Accordingly, although the pesticide industry argued vigorously below for *en banc* rehearing, EPA did not seek rehearing, and not a single judge on the Sixth Circuit – a forum chosen by the pesticide industry itself to hear this case – called for a vote on rehearing. CropLife Pet.App. 64a. Petitioners' suggestion that the case must now be remanded in light of *Burlington Northern and Santa Fe Railway Co. v. United States*, 129 S.Ct. 1870 (2009) – a case they thought not important enough to call to the attention of the Sixth Circuit while their petition for rehearing was pending – does not bear up under even casual scrutiny.

Petitioners also are wrong in suggesting that EPA has held a consistent position on this issue since 1972. In 1999, the agency stated formally that, in line with its "consistent" historical interpretation, "[aquatic] pesticides containing pollutants may be discharged from point sources into the navigable waters only pursuant to a properly issued CWA permit." Res.App. 14. And while EPA did not itself issue permits for aquatic pesticide applications, it characterized this as a matter of "enforcement" discretion (not legal interpretation) as late as 2002. JA 91.[1] It was only after a strenuous lobbying effort by the pesticide industry that EPA took the position it did in the 2006 exemption rule. Tebbutt Decl. Supp. Envtl. Pet. Mot. Dismiss ¶¶ 2-3 (5/1/07).

Rather than seeking rehearing or petitioning for *certiorari*, EPA sought, and was granted, a two-year stay of the mandate so it can develop an effective CWA permitting program for aquatic pesticide applications. As EPA noted, this two-year stay will "allow EPA and authorized permitting authorities sufficient time to develop and issue Clean Water Act permits containing appropriate terms to govern the discharge of pesticide pollutants to waters of the United States." CropLife Pet.App. 108a-109a.

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[1] Citations to documents not in appendices to briefs to this Court are to the Joint Appendix (cited as "JA") used in the Sixth Circuit wherever possible, otherwise cites are to the document in the Sixth Circuit docket.

Petitioners' contention that this will be the "greatest" or "most dramatic" regulatory expansion in CWA history, AFBF Pet. 13; CropLife Pet. 29, is, at best, a vast exaggeration. The number of annual discharges that will be brought into the permitting fold under pesticide applicator permits is likely to be no larger than that associated with any of the scores of industrial categories already regulated under the Act's permitting scheme. Moreover, the Sixth Circuit opinion – like the EPA rule that it set aside – pertains only to discharges to or over waters. Not only are terrestrial (land-based) pesticide applications outside the scope of this opinion, but *agricultural* runoff and return flow (about which Petitioners profess to be particularly concerned) are statutorily exempted from the Act's permitting requirements altogether.

Petitioners' further claims that requiring permits for aquatic pesticide applications will promote disease, imperil the nation's food supply, and compromise national security are demonstrably false. Four states – California, Nevada, Oregon, and Washington – had implemented CWA permitting programs for aquatic pesticides prior to EPA's 2006 regulation, all without calamity. California urged EPA *not* to exclude aquatic pesticides from the Act's permitting requirements, noting that over one quarter of the state's waterways were already impaired by pesticide constituents. JA 142-43.

Finally, Petitioners' suggestion that an aquatic pesticide exemption from the CWA's permitting program should be *implied* from the existence of the

Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136, *et seq.*, is fundamentally inconsistent with the language and structure of the two statutes. As EPA stated in 1999, "[n]othing in FIFRA or the CWA remotely suggests that compliance with FIFRA also means compliance with the CWA." Res.App. 11. Rather, FIFRA is a screening statute that determines whether a pesticide may be introduced into commerce. It "does not occupy the field of pesticide regulation in general or the area of local use permitting in particular," and "certainly does not equate registration and labeling requirements with a general approval to apply pesticides." *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 613-14 (1991).

At root, Petitioners' real complaint is that pesticide applicators now face systematic regulation under the Act. This fact, however, places them in no different position from all of the other private and public entities who have had to learn to live with – and ultimately prosper under – CWA regulation since the permit program was introduced in 1972 to clean up our nation's waters.

REASONS FOR DENYING THE PETITIONS

The petitions for a writ of *certiorari* should be denied because the Sixth Circuit's opinion conflicts with no opinion of this Court or of any court of appeals, and because it is faithful to the statute and to governing principles of statutory construction.

Moreover, the practical effect of the opinion will be no different from that of dozens of other circuit court decisions defining the regulatory reach of the CWA.

I. THE SIXTH CIRCUIT'S OPINION IS HARMONIOUS WITH FEDERAL APPELLATE JURISPRUDENCE INTERPRETING THE CWA.

The central regulatory feature of the CWA's program to protect the waters of the United States is the National Pollutant Discharge Elimination System ("NPDES") permitting system. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 319 (1982). An NPDES permit is required for "the discharge of any pollutant," 33 U.S.C. § 1342(a)(1), and the "discharge of a pollutant," in turn, is defined as "*any* addition of *any* pollutant to navigable waters from *any* point source," *id.* § 1362(12) (emphases added). *See generally Department of Housing & Urban Dev. v. Rucker*, 535 U.S. 125, 131 (2002) ("the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (citation omitted). The Act defines "point source" to mean "any discernable, confined[,] and discrete conveyance," and its definition of "pollutant" includes, *inter alia*, "chemical wastes" and "biological materials." 33 U.S.C. §§ 1362(6) & (14). The Act itself explicitly exempts certain discharges from the NPDES requirement, and EPA has no general authority under the statute to grant further exemptions. *See Natural Res. Def. Council ("NRDC") v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977).

The Sixth Circuit opinion here is wholly consonant with a long line of federal appellate decisions interpreting the scope of the NPDES program broadly to achieve the Act's substantive goals. *E.g., Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 565-66 (5th Cir. 1996); *cf. Rapanos v. United States*, 547 U.S. 715, 723 (2006) ("the discharge of a pollutant" and "pollutant" are "defined broadly").[2]

The opinion is also consistent with multiple appellate court holdings that Congress intended water pollution to be controlled through "point source" regulation whenever feasible, *e.g., United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979); that a point source "adds" a pollutant when it "introduces" that pollutant to the waters "from the outside world," *e.g., Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2001); *cf. South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 103 (2004); and that there is no implied NPDES exemption for discharges made for allegedly beneficial purposes, *e.g., Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 627 (8th Cir. 1979).

Further, the Sixth Circuit's specific holding that NPDES permitting is required for the discharge of chemical pesticides that include excess or residual

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[2] As the Sixth Circuit noted, however, it "need not consider the . . . breadth" of the term "pollutant," since "§ 1362([6]) [is] unambiguous as to pesticides." CropLife Pet.App. 15a.

chemicals, and for the discharge of biological pesticides, is exactly the same conclusion reached by the only other court of appeals to address the issue. *See Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001) (NPDES permit is required for aquatic pesticide discharge because "residual" chemical pesticide left in water after aquatic application "qualifies as a chemical waste"); *Fairhurst v. Hagener*, 422 F.3d 1146, 1150-51 (9th Cir. 2005) (chemical pesticides that "produce no residue or unintended effects" are not pollutants, but aquatic pesticide application that will produce excess or residue requires a permit); *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1185 (9th Cir. 2002) (biological pesticides are pollutants and their application over waters requires a permit).

Despite the unanimity of federal appellate jurisprudence supporting the Sixth Circuit's decision, Petitioners claim that "[a] more concrete circuit split is not possible," CropLife Pet. 2, because petitions for review of EPA's rule were filed in numerous circuits before being consolidated randomly in the Sixth Circuit. But many (if not most) challenges to EPA rulemaking efforts under the CWA are brought in multiple circuits, and there is no indication that Congress, by enacting the venue-determination provisions in 33 U.S.C. § 1369(b) and 28 U.S.C. § 2112(a)(3), meant for all such challenges to be resolved by this Court. Further, it is highly speculative to suggest that any of the other circuits in which petitions were filed would have come to a

conclusion different from that reached by the Sixth Circuit. Finally, given that the Ninth Circuit decisions discussed above implicated precisely the same legal propositions at issue in EPA's rule, a circuit split was indeed "possible" – it just did not materialize.[3]

Nor does this Court's opinion in *Burlington Northern* conflict with the Sixth Circuit's ruling, much less compel a remand. Although Petitioners emphasize that this "highly analogous" opinion was "issued after the Sixth Circuit's decision," CropLife Pet. 17, they omit that it was issued *before* the Sixth Circuit unanimously denied their then-pending petition for rehearing *en banc*. Petitioners could have called *Burlington* to the lower court's attention at that time (as they did two other intervening opinions, *see* Rule 28(j) Resp. (6/15/09); Rule 28(j) Resp. (7/13/09)), but chose not to do so.

In *Burlington Northern*, this Court rejected EPA's attempt to impose retroactive financial liability on a pesticide *seller* under a different federal statute – the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") – when a third party distributor stored and carelessly spilled that pesticide elsewhere. 129 S.Ct. at 1875. Contrary to Petitioners' assertion, the Court did not address the question of whether a pesticide can be a "waste" when "serving its intended purpose." CropLife Pet. 18.

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[3] As Petitioners note, the Second Circuit did not rule on the question. CropLife Pet. 6; AFBF Pet. 7.

Indeed, the case did not address the meaning of "waste," and it involved no pesticide *use* at all (as discussed below, *infra* 25, CERCLA explicitly exempts applicators of FIFRA-registered pesticides from liability).

The question of intent arose solely in the context of whether the seller "*arranged* for disposal . . . of hazardous substances," so as to be jointly liable for the third party's spills under 42 U.S.C. § 9607(a)(3) (emphasis added). 129 S.Ct. at 1878. To answer that question, this Court employed precisely the same interpretive method applied by the Sixth Circuit here: because CERCLA does not define "arrange," the Court looked to dictionary definitions, and construed the term in accordance with its ordinary meaning. Noting that "the word 'arrange' implies action directed to a specific purpose," the Court concluded that an entity *arranges* for disposal "when it takes intentional steps to dispose." *Id.* at 1879.

Burlington Northern is not remotely analogous to this case. The meaning of "arrange" under CERCLA has nothing to do with the meaning of "waste" under the CWA. Moreover, the Sixth Circuit did not hold that pesticide *sellers* could be liable as "dischargers of pollutants" under the CWA for pesticides later applied to water by third parties. Rather, it held that pesticide *applicators* must obtain coverage under NPDES permits before they may legally discharge pollutants to or over water.

Petitioners' further contention that the ruling below is "flatly inconsistent" with *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199 (2d Cir. 2009), CropLife Pet. 20-21, likewise misses the mark. There, the only interpretation of "waste" came under the Resource Conservation and Recovery Act ("RCRA"). Although the term "waste" is not defined in the CWA, "solid waste" is narrowly defined in RCRA to mean "discarded material" that has been "abandoned." 42 U.S.C. § 6903(27); 40 C.F.R. § 261.2(a)(2)(i)(A), (b). Accordingly, the Second Circuit held in *Cordiano* that the operators of a gun club need not obtain a "hazardous waste disposal" permit under RCRA because spent ammunition from their firing range did not meet that narrow definition. 575 F.3d at 206-07.

Despite the differences between the two statutes, Petitioners argue that RCRA's definition of "solid waste" should determine the meaning of "chemical waste" and "biological materials" under the CWA, so as to preclude NPDES coverage for the discharge of "materials put to their ordinary, intended use." CropLife Pet. 20. EPA squarely disagrees. In a 1995 amicus brief, EPA stated that spent rounds and skeet targets from firing ranges *are* "pollutants" under the CWA even though they are *not* "solid waste" under RCRA. *See Long Island Soundkeeper Fund v. New York Athletic Club*, 1996 WL 131863, at *9, *14-*15 (S.D.N.Y. 1996) (adopting EPA's construction). Similarly, in its 2006 preamble to the pesticide exemption, EPA specified that "today's discussion of the terms 'chemical waste' and 'biological materials' *applies only*

for CWA purposes and is *not intended to address the use of those terms or similar terms under any other statutes the Agency administers*." CropLife Pet.App. 42a (emphases added).

II. THE COURT'S *CHEVRON* ANALYSIS WAS CORRECTLY PERFORMED.

To determine whether EPA's regulation exempting pesticide applications "to" and "over" surface waters was consistent with the CWA, the Sixth Circuit employed and properly conducted the familiar *Chevron* analysis. *See*, *e.g.*, CropLife Pet.App. 10a (citing *Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984), and *National Ass'n of Home Builders v. Defenders of Wildlife*, 127 S.Ct. 2518, 2534 (2007)); *id.* 14a (citing additional cases).

Appropriately, the court relied primarily on a careful reading of the statutory language. *E.g.*, *City of Chicago v. Environmental Def. Fund*, 511 U.S. 328, 339 (1994) ("It is not unusual for legislation to contain diverse purposes that must be reconciled, and the most reliable guide for that task is the enacted text."). The Sixth Circuit was aided in its textual analysis by the fact that two of the operative terms in the definition of "discharge of a pollutant" – "pollutant" and "point source" – are themselves separately defined in the statute. 33 U.S.C. § 1362(6) & (14). This generous degree of statutory guidance easily distinguishes this case from *Entergy Corp. v. Riverkeeper, Inc.*, 129 S.Ct. 1498 (2009), on which

Petitioners rely, CropLife Pet. 22 n.11, 25-26; AFBF Pet. 22, 26 n.15, as *Entergy* addressed a terse provision of the CWA found to be "silent . . . with respect to all potentially relevant factors." 129 S.Ct. at 1508.

Where terms in the statutory definitions were not themselves specifically defined, the Sixth Circuit gave them their "ordinary, contemporary, [and] common meaning," CropLife Pet.App. 15a (quoting *Williams v. Taylor*, 529 U.S. 420, 431-32 (2000)), and then tested that meaning against the structure, purpose, and history of the statute. Finally, the court looked to the longstanding interpretations given to these terms by the principal regulatory agency, EPA.

Petitioners chide the Sixth Circuit for not simply deferring to all of the interpretations offered by EPA in the rule itself, arguing that the court's approach thus "renders agency interpretive rules vulnerable to the subjective interpretations and policy making of judges." AFBF Pet. 27. Petitioners overlook the critical function of the *Chevron* Step One analysis: to guard against wholesale legislating by unelected executive branch employees. So long as a court's analysis is, like the Sixth Circuit's here, faithful to the language drafted by Congress, the court is not itself making policy, but rather is giving effect to the policies of Congress. *E.g., City of Chicago*, 511 U.S. at 339 (setting aside EPA hazardous waste exemption for municipal fly ash because it conflicted with the plain language of RCRA). Such adherence to the plain statutory language is essential to the preservation of

the separation of powers between the legislative and executive branches.

A. The Court Properly Held That Pesticide Applications That Result in Discharge of Chemical Waste Directly to Waters Are Subject to CWA Permitting.

As EPA recognizes, and as Petitioners apparently concede, the airplanes, trucks, and the like used to apply pesticides "to" and "over" water are "point sources" within the meaning of 33 U.S.C. § 1362(14). CropLife Pet.App. 21a. The Sixth Circuit's determination that residual and excess pesticide materials are "chemical wastes" that are "discharged" from these point source pesticide applications follows directly from the language of the CWA, and is consistent with the purpose of the statute, with logic, and with longstanding precedent.

1. Excess and Residual Pesticide Materials Are "Chemical Wastes" Within the Meaning of the CWA.

To determine the ordinary meaning of "waste," the court consulted three authoritative dictionaries and concluded that among the common meanings of the term are "superfluous" and "excess" materials, materials that are "no longer useful," and "worthless byproduct[s]." CropLife Pet.App. 15a-16a. Thus, the court found, while chemical pesticides applied to

water for a beneficial purpose are not themselves waste, "excess pesticide and pesticide residue meet the common definition of waste." *Id.* 16a. This interpretation hardly "stretches logic and English usage past the breaking point." AFBF Pet. 21. Rather, it is precisely the same conclusion reached by EPA, both in the preamble to the rule at issue here, CropLife Pet.App. 41a ("residual [pesticide] materials are . . . pollutants"), and in its longstanding practice of treating pesticide materials in point source storm water discharges as pollutants, *id.* 40a-41a; *see also* 55 Fed. Reg. 47,990, 48,019-20 (Nov. 16, 1990) (JA 309-10).

While Petitioners concede that excess and residual chemicals fall within the common meaning of waste, CropLife Pet. 14 ("the common meaning of 'chemical waste' is 'discarded,' 'superfluous,' or 'excess' chemical"), they argue that pesticide materials cannot be pollutants because pesticide applicators do not treat them as waste, *id.* 18 ("'waste' . . . implies an *intention* to discard"). It is curious that those who counsel agency deference would take this position, as it is diametrically opposed to EPA's own interpretation of the Act. EPA has long rejected the notion that the need for an NPDES permit turns on a discharger's intent. *E.g.*, EPA Sixth Cir. Merits Br. 39 (11/6/07). If intent were the key, EPA and the Corps of Engineers could not regulate fill material as the discharge of a pollutant when it is added to waterways for the (beneficial) purpose of changing their bottom elevations, yet they have long done so, with the

blessing of the federal courts. *E.g., Rapanos*, 547 U.S. at 760.

Moreover, it is hardly noteworthy that pesticides are not specifically mentioned in the "laundry list" of substances included in the Act's definition of "pollutant." AFBF Pet. 30. Machine oil, paint, and industrial solvents also are not listed, yet all clearly can be pollutants, because "chemical waste" *is* specifically listed. *See Pittston Coal Group v. Sebben*, 488 U.S. 105, 115 (1988) (no ambiguity where the statute "plainly embraces criteria of more general application").

2. The Excess and Residual Pesticide Materials Are Added to Waters "From" Point Sources.

The only aspect of EPA's reasoning here that the court found inconsistent with the statute was the agency's illogical position that the excess and residual pesticides placed in waters by point source pesticide applications are not discharged by those point sources. EPA took this position only at the very end of its rulemaking, when it realized that a previously articulated rationale for the pesticide exemption was untenable.[4] *Compare* 70 Fed. Reg. 5,093, 5,099 (Feb.

[4] In its explanation for the proposed rule, EPA had stated that pesticide residues from lawful pesticide applications are not pollutants. It dropped this rationale after receiving comments noting that this was inconsistent with its own longstanding

(Continued on following page)

1, 2005) (JA 140), *with* CropLife Pet.App. 41a-42a. As the Sixth Circuit noted, EPA's new position was fundamentally inconsistent not only with the language and purpose of the Act, but with what the agency itself had recently characterized as "EPA's longstanding position . . . that an NPDES pollutant is 'added' when it is introduced into a water from the 'outside world' by a point source." CropLife Pet.App. 23a (quoting 73 Fed. Reg. 33,697, 33,701 (June 13, 2008) (final rule defining phrase "addition of any pollutant" in 33 U.S.C. § 1362(12)). Certainly, the excess and residual pesticide is "introduced into the water from the outside world" by the point source applicator.

Petitioners' argument to the contrary – that "[o]ne cannot spray ice 'from' a hose," or "squeeze butter 'from' a cow," AFBF Pet. 22 – misses the point. Those examples rely on a transformative intermediary (a temperature drop and the butter churn, respectively), while pesticides become waste material with no transformation whatsoever. CropLife Pet.App. 21a ("excess and residue pesticides have *exactly the same chemical composition* and are discharged from the *same* point source *at exactly the same time* as the original pesticide") (emphases added). Further, as the Sixth Circuit found, all "excess" or "residual" pesticide deposited to the water from aerial applications to

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interpretation that such residues *are* pollutants when they reach waterways (*e.g.*, in stormwater).

pests *over* water is "necessarily" waste before it enters the water. *Id.* 17a. All of the "excess" pesticide from applications *to* the water – the portion that does not reach the target – is also waste at the point of discharge.[5] *See also id.* ("both non-waste aqueous pesticide and pesticide residual are applied to the water at the same moment").

Indeed, even if one were to assume that none of the pesticide became waste until *after* discharge to the water, there would be nothing remarkable about the conclusion that the discharge to the water of something that inexorably *becomes* a pollutant shortly after discharge is the discharge of that pollutant.[6] EPA itself has long held this position. *See supra* p. 11 (skeet targets used at firing range).

Petitioners' further suggestion that the statute is ambiguous because it uses the simple term "from," AFBF Pet. 22-23, is preposterous. Indeed, as Petitioners later acknowledge, "[t]he words and their natural reading are fairly simple." *Id.* 25. The ordinary meaning of "from" is "a function word to indicate

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[5] Petitioners tend to emphasize pesticide "residue," while downplaying the court's finding that "excess" pesticide is also waste, in an attempt to obscure this fact. AFBF Pet. 10, 20-23; CropLife Pet. 9, 10.

[6] *E.g.*, *NRDC v. Southwest Marine, Inc.*, 236 F.3d 985, 990 (9th Cir. 2000) (aerial discharge of cleaning and paint products during use at marina); *Hudson River Fishermen's Ass'n v. City of New York*, 751 F. Supp. 1088, 1101-02 (S.D.N.Y. 1990) (chlorine and alum injected to waterway as purification agents), *aff'd*, 940 F.2d 649 (2d Cir. 1991).

a starting point of a physical movement." Merriam-Webster Online Dictionary, first definition (emphasis added), *available at* http://www.merriam-webster.com/dictionary/from. If the excess and residual pesticide does not come "from" the point source, from where *does* it come? In Petitioners' view, apparently, it arises spontaneously.[7]

As the Sixth Circuit observed, its holding on this point is also fully consistent with legislative history indicating the Act's intent that water pollution be controlled through "point source" regulation when feasible, and with the Act's central purpose of protecting surface waters through the NPDES permitting program. CropLife Pet.App. 14a-15a, 22a-23a (citing S.Rep. No. 92-414, at 76-78 (1971)), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3742-44.

3. Petitioners' Professed Concerns About the Reach of This Holding Are, at Best, Substantially Overblown.

Imagining catastrophe, Petitioners argue that the Sixth Circuit's opinion will sweep into the Act's permitting program a variety of activities Congress

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[7] Petitioners offer the following analysis: "'Pollutants *from* a point source,' in common parlance, means pollutants *coming out of* a point source – not pollutants *caused by* a point source." AFBF Pet. 25. Even if there is a meaningful difference between these two phrasings, there can be no question that excess and residual pesticide "comes out of" the point source pesticide application.

did not intend to regulate. These arguments either misread the court's opinion or ignore other portions of the statute. At best, they suggest that this case warrants review because other courts may mistakenly extend the Sixth Circuit's analysis beyond the opinion's holding. This is not the standard for *certiorari*.

For example, Petitioners argue that the court "created its own 'but for' test" and thereby "found that the 'plain language' of the CWA *mandates* a holding that there is a 'discharge of a pollutant' subject to NPDES permitting *whenever* a pesticide residue makes its way to navigable waters." CropLife Pet. 10 (second emphasis added). This is patently untrue. The Sixth Circuit's application of a "but for" analysis to pesticides discharged *directly into or over* surface waters was simply a means of demonstrating that excess and residual pesticide materials are "added" to the surface waters from these point source applications, and the court's opinion (like the EPA rule it addresses) is limited to that set of facts. The opinion does not purport to transform the eventual runoff to surface waters from pesticides applied *on the land* into point source discharges.

Nonetheless, Petitioners suggest that the Sixth Circuit's reasoning *could* be extended that far, requiring, for example, NPDES permitting for "farmers who use pesticides to save crops." AFBF Pet. 13. But the Act itself explicitly *exempts* "agricultural stormwater discharges and return flows from irrigated agriculture" from the definition of "point source" – and thus from NPDES permitting requirements –

even when it reaches the water through a discrete conveyance that would otherwise be classified as a point source. 33 U.S.C. § 1362(14). Where non-agricultural additions of pesticide residues to water come from diffuse "nonpoint sources" (such as sheet runoff from golf courses or residential areas), they will continue to be outside of the Act's permitting program as well. *See generally Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976) (NPDES program does not regulate "unchanneled and uncollected surface waters"). No NPDES permit is required for diffuse pesticide runoff because the pesticide residues do not *enter the water* directly "from" the point source pesticide application.

Petitioners also express concern that airborne pesticide "drift" to surface waters from aerial spraying on land may be subject to NPDES permitting, another topic not addressed by the opinion below. CropLife Pet. 29-30; AFBF Pet. 16-17. When it issued the pesticide exemption, EPA specifically declined to extend the exemption to such situations, noting that it is "continuing to consider the applicability of the CWA to . . . [the] drift of pesticides applied aerially over land."[8] CropLife Pet.App. 43a-44a. Review of the Sixth Circuit's opinion to address this inchoate, ancillary issue is not warranted.

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[8] One focus of the multi-stakeholder advisory committee EPA has established to study the issue is "minimizing both the occurrence and potential adverse effects of pesticide spray drift." *Id.* 44a.

B. The Sixth Circuit Properly Held That Biological Pesticides Are Biological Materials.

No one disputes that biological pesticides *are*, in fact, biological materials. EPA describes them as "microorganisms, including bacteria, fungi, viruses, and protozoa," and as being "derived from plants, fungi, bacteria, or other non-man-made synthesis."[9] Under *Chevron*, this ends the analysis. The statutory language is clear, and the substances in question plainly come within that language.

Petitioners endeavor to inject "ambiguity" into the plain statutory language with two arguments. The first is that Congress could not possibly have meant what it said. As the Sixth Circuit noted, however, "Congress purposefully included the term 'biological materials,' rather than a more limited term such as 'biological wastes.'"[10] CropLife Pet.App. 19a. Although Petitioners seek support for a contrary reading from *Train v. Colorado Public Interest Research Group*, 426 U.S. 1 (1976), *see* CropLife Pet.

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[9] EPA, *Pesticides: Glossary*, *available at* http://www.epa.gov/pesticides/glossary; *see also* 64 Fed. Reg. 46,012, 46,017 (Aug. 23, 1999).

[10] This was not a result of careless drafting: Congress *did* append the term "waste" to five of the other enumerated "pollutants" in 33 U.S.C. § 1362(6). Moreover, that list includes six other items that also are not necessarily "wastes." *Id.* ("munitions," "radioactive materials," "heat," "rock," "sand," and "cellar dirt").

22 n.11; AFBF Pet. 35-36, that case illustrates the kind of exceptional circumstances that must be present before the courts may disregard the plain text of a statute. There, this Court found clear and unequivocal evidence in the legislative history of the CWA that Congress did not intend the Act to regulate the nuclear byproduct materials covered by the Atomic Energy Act. Thus, the Court held that the unqualified inclusion of "radioactive materials" in the Act's definition of pollutant had been, in effect, a scrivener's error. 426 U.S. at 11-24. As discussed below, there is nothing in the legislative history stating that Congress did not intend the Act to cover pesticides.

Petitioners' second argument is that a plain reading of the statute could lead to absurd results, "such as NPDES permitting for a worm at the end of a fisherman's line." CropLife Pet. 22 n.11. This is not a serious possibility. Several circuit courts have found an implied exemption in the Act for *de minimis* situations of that nature,[11] and this Court has reversed a contrary decision on that very issue, *Arkansas v. Oklahoma*, 503 U.S. 91, 96, 110-12 (1992).

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[11] *E.g.*, *Kentucky Waterways Alliance v. Johnson*, 540 F.3d 466, 483, 491 (6th Cir. 2008) (citing cases); *cf. United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 647 (2d Cir. 1993) (passerby flinging candy wrapper into river or swimmer urinating is not violating the Act). EPA recognizes this principle as well. *E.g.*, 58 Fed. Reg. 45,008, 45,020 (Aug. 25, 1993) (no "dredge and fill" permit required under 33 U.S.C. § 1344 for *de minimis* additions to waters).

The potential harm from biological pesticides, on the other hand, cannot reasonably be characterized as *de minimis*. Biological pesticides are designed to cause harm to certain species, and can harm others as well. Thus, while the Ninth Circuit has applied the *de minimis* principle in holding that native mussels taken from one part of Puget Sound and deposited to another are not "pollutants" under the Act, *Association to Protect Hammersley, Eld, & Totten Inlets ("APHETI") v. Taylor Res., Inc.*, 299 F.3d 1007, 1017 (9th Cir. 2002), it has also held that biological insecticides "meet the definition of 'pollutant' under the [CWA]," *Forsgren*, 309 F.3d at 1185, noting that "[t]he record reveals a number of harmful side effects" to their use, *id.* at 1183.[12]

Moreover, the Sixth Circuit was careful to note that it was not endeavoring to "define[] the outermost bounds of 'biological materials'" within the meaning of the Act's definition of pollutant. CropLife Pet.App. 19a. Rather, the court simply held that, whatever those limits might reasonably be, biological pesticides come within them.

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[12] The common feature among the items listed as "pollutants" is that *all may impair water quality*, a feature that biological pesticides share. *See Northern Plains Res. Council v. Fidelity Expl. & Dev. Co.*, 325 F.3d 1155, 1162-63 (9th Cir. 2003) (clarifying that the *APHETI* holding turned on whether there was "degradation of the quality of receiving waters")

C. The CWA Does Not Exempt Pesticides From Its Purview.

Alternatively, Petitioners argue that the Sixth Circuit should have ruled that the CWA *impliedly* exempts pesticide materials from NPDES permitting requirements. Such a ruling would have been particularly unwarranted, given that Congress has already included an *express* NPDES exemption for some agricultural pesticide discharges, 33 U.S.C. §§ 1362(14), 1342(l)(i), but not for pesticide use generally. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978) (applying maxim of *expressio unius est exclusio alterius* to reject implied exemption under similar circumstances). Congress has plainly demonstrated elsewhere that it knows how to exempt pesticide use when it wants to. *E.g.*, 42 U.S.C. § 9607(i) (exempting applicators of FIFRA-registered pesticides from CERCLA liability); *cf. City of Chicago*, 511 U.S. at 338 ("Congress knew how to draft a waste stream exemption in RCRA when it wanted to.").

None of Petitioners' arguments on implied exemption has merit. That the legislative history of the 1972 Act does not discuss the permitting of pesticide discharges, AFBF Pet. 30, is unavailing. *See Moskal v. United States*, 498 U.S. 103, 111 (1990) ("This Court has never required that every permissible application of a statute be expressly referred to in its legislative history."). Moreover, there is nothing in the legislative history to indicate that Congress intended to exempt pesticide use from the Act's provisions but forgot to do so. Petitioners cite statements from

Senator Dole, AFBF Pet. 29-30 n.16; CropLife Pet. 23 n.12, regarding the general benefit of pesticides – which are similar to statements made by other members of Congress about the benefit of industry generally – but they fail to mention Senator Dole's pointed observation that some pesticides "retain their potency for virtually unlimited periods after application, their residues are introduced into the complicated food chains at work in nature, and, ultimately, they become concentrated at levels which are hazardous to both animal and human life." S.Rep. No. 92-414, at 99.

That Congress chose in 1977 to exempt *some* pesticide discharges by adding an exemption for certain agricultural flows, CropLife Pet. 26, simply makes the point that they were not exempted previously. There would have been no *need* for this limited exemption if, as Petitioners argue, all pesticide discharges had *already* been exempted in the 1972 Act.[13]

Moreover, there was no "contemporaneous interpretation" by EPA that pesticide discharges were exempt. AFBF Pet. 33-34; CropLife Pet. 25-26. EPA made various statements from 1977 through 1996

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[13] The pertinent legislative history indicates that Congress specifically meant for the 1977 exemption to extend to "pesticides" as one of the harmful constituents of agricultural runoff (based on the usually "diffuse" nature of those discharges). S.Rep. No. 95-370, at 37 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 4326, 4353.

indicating that pesticides may be "discharged" to water only "in accordance with an NPDES permit," CropLife Pet.App. 5a, stated in a 1999 amicus brief that "EPA approves pesticides under FIFRA with the knowledge that pesticides containing pollutants may be discharged from point sources into the navigable waters only pursuant to a properly issued CWA permit," Res.App. 14,[14] and published policy guidance documents in 2001 and 2002 characterizing the application of aquatic pesticides as a "low *enforcement* priority," JA 91 (emphasis added). At most, at the time EPA published its final rule in 2006, the agency had a 30-year track record of *not enforcing* the CWA against unpermitted pesticide applications made to water – "a sort of 30-year adverse possession" marked by the agency's "disregard of statutory text." *Rapanos*, 547 U.S. at 752. Because this practice was not formally announced – and because EPA's public statements suggested that permitting *was* occurring – Congress would have had no reason to know about it. *See Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991).

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[14] EPA's brief in *Headwaters*, *see supra* p. 8, stated that the Act was *unambiguous* on this point. Alternatively, EPA sought deference for its position under Chevron Step Two based on its "consistent" historical interpretation. *Id.* 18-21. Agency amicus briefs are not mere "litigation positions." Especially where, as here, the agency offers a broad policy position of its own accord, "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

Nor is section 104(l) of the Act supportive of an implied pesticide exemption. That provision – which *no party* thought important enough to cite to the Sixth Circuit, but which Petitioners now offer as a central point in their argument – directs EPA to study (1) the fate and effect of pesticides in waterways, (2) "methods to control" pesticide releases, and (3) "alternatives" to pesticides. 33 U.S.C. § 1254(l). This provision, if anything, suggests that Congress believed that pesticides *are* within the purview of the CWA. It is certainly not inconsistent with NPDES permitting for pesticide pollutants, and evinces no intent to override later sections of the Act that actually *address* the question of when an NPDES permit is required.[15] Indeed, other subsections of section 104 direct EPA to also study *other* substances that are undisputedly regulated under the NPDES program. *Id.* § 1254(m) (waste oil), § 1254(o) (sewage).

Petitioners' further suggestion that FIFRA should be read to imply an intent to exclude pesticides from the CWA is flatly inconsistent with the language of the statutes and the decisions of this Court. Petitioners point to no language in the text or history of either statute to indicate a clear intent that the CWA stand down in favor of FIFRA, and it is a bedrock principle of statutory construction that "where two statutes are capable of coexistence, it is the duty of

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[15] The same is true of section 208, 33 U.S.C. § 1288, a provision of general application on which Petitioners now purport to rely.

the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) (internal quotes omitted) (reading FIFRA narrowly to avoid conflict with the Tucker Act). In the field of federal environmental law, overlapping protection by multiple statutes is the norm, not the exception, *e.g.*, Res.App. 10-11, 16-20 (citing examples); *Monongahela Power Co. v. Marsh*, 809 F.2d 41, 53 (D.C. Cir. 1987), and this Court has already held that FIFRA is not the final regulatory word on pesticide use, *Mortier*, 501 U.S. at 613-14. As EPA has noted, the CWA and FIFRA serve different purposes, use different risk management approaches, and employ different – but not inconsistent – control strategies. Res.App. 10-21; *see also Headwaters*, 243 F.3d at 531-32; *cf. Erlenbaugh v. United States*, 409 U.S. 239, 244-48 (1972) (refusing to apply the canon of *in pari materia* "to introduce an exception to the coverage of [a broad, remedial statute] where none is now apparent").

Finally, Petitioners' claim that "the overall statutory scheme" supports its interpretation because the NPDES "is not a program to regulate beneficial activities that also can have adverse environmental effects, but a program to eliminate pollutant discharges seen as serving no societal good," AFBF Pet. 31, is demonstrably untrue. Pest control activities are no different in this respect from steel mills or military installations, both of which provide an obvious social good, yet are nonetheless regulated by the NPDES program to control their adverse effects.

III. THE PRACTICAL EFFECT OF THE SIXTH CIRCUIT OPINION WILL NOT BE UNDULY DISRUPTIVE, AND WILL BENEFIT THE ENVIRONMENT AND PUBLIC HEALTH.

A. Petitioners Vastly Overstate the Disruption That May Be Occasioned by NPDES Permitting for Aquatic Pesticides.

Relying largely on a quote taken out of context from EPA's brief in support of the stay of the mandate, Petitioners argue that there will be "significant disruption" to pesticide use. CropLife Pet. 2-3, 12; AFBF Pet. 12. But EPA did not, as petitioners suggest, state that subjecting pesticide discharges to NPDES permitting would be inherently disruptive. Rather, EPA stated that the decision would be disruptive *unless stayed*, but that granting the two-year stay would eliminate the disruption by "allow[ing] EPA and authorized permitting authorities sufficient time to develop and issue [CWA] permits containing appropriate terms to govern the discharge of pesticide pollutants to waters of the United States." CropLife Pet.App. 108a-109a. Until the permits are issued, pesticide applicators are allowed to continue practices as usual without threat of CWA enforcement.

Any future disruption to food production or disease control is purely speculative. The vast majority of the nation's agricultural activities were unaffected by the rule in the first place and will remain

unaffected by the decision below, both because the Act exempts agricultural stormwater and irrigation return flows from NPDES regulation and because most agricultural pesticide use does not involve discharges "to" or "over" waters.

Nor have Petitioners offered any concrete examples of increased threats to public health resulting from NPDES permitting. Recent history shows this fear to be unfounded. Four states – California, Oregon, Washington, and Nevada – issued general NPDES permits covering many pesticide applications to waters after the 2001 *Headwaters* decision. CropLife Pet.App. 31a. And, as EPA has noted, "twenty-three states have developed permits to cover some types of pesticide discharges." *Id.* 149a. In none of these situations were pest control efforts substantially impeded, or a public health threat caused, by the imposition of a permitting requirement.

Petitioners premise the bulk of their arguments on the false assumption that they face a stark binary choice between ceasing their activities and violating the CWA. Yet there are many ways to avoid discharging pesticides into waters – such as the use of buffer zones around waterways, or using means of control other than pesticides – that would obviate the need for CWA permitting altogether. Should these options not be available, obtaining and complying with NPDES permits would render necessary discharges legal.

Under the Sixth Circuit's stay, EPA is moving forward with the development of a "model" general permit, which it expects to serve as a template to ease administrative burden on state and tribal permitting agencies, as well as on pesticide applicators. CropLife Pet.App. 115a-116a, 118a-119a; *see generally Miccosukee Tribe*, 541 U.S. at 108 n.* (noting efficiency of general permit approach). The use of general permits is not merely a "theoretical possibility." AFBF Pet. 19 n.12. EPA is proceeding under this approach precisely because it believes that most aquatic pesticide applications will, in fact, be covered under that general permit (or a state equivalent). In those instances where pesticide use is "safe" (as Petitioners maintain is often the case), permitting should be relatively easy.

B. The Permitting of Aquatic Pesticides Does Not Constitute "the Greatest Expansion" of the NPDES Program.

Petitioners' contention that the decision below constitutes the "greatest" or "most dramatic" regulatory expansion in CWA history, AFBF Pet. 13; CropLife Pet. 29, is pure fantasy. In fact, several times prior to the Sixth Circuit's ruling (most recently two years ago), federal appellate courts struck down illegal attempts by EPA to exempt point source

discharges from the NPDES program.[16] Each of these was at least as "dramatic" as this one. Moreover, Petitioners greatly understate the scope and complexity of the *existing* NPDES permitting program. At present, that program includes 57 effluent limitation guideline categories, with roughly 450 subcategories, *see* 40 C.F.R. Subchapter N (Parts 405-471); aquatic pesticides will be just one more category, with eight proposed subcategories. Permits in most of these other categories are far more complex than will be required for routine pesticide applications.[17]

Furthermore, an examination of EPA's estimate of the potential universe of aquatic pesticide permitting demonstrates both that the agency's projections are likely to be exaggerated and that the overwhelming majority of permitted applications will

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[16] *E.g.*, *Costle*, 568 F.2d at 1372-73 (certain silviculture, agricultural, and stormwater discharges); *Northwest Envtl. Advocates v. EPA*, 537 F.3d 1006 (9th Cir. 2008) (ballast water from ships).

[17] EPA estimates that over 115,000 facilities are presently covered by NPDES permits, of which over 45,000 have individual permits, and 6,700 of which are "major" facilities (*e.g.*, oil refineries, chemical manufacturing facilities, power plants). EPA, *Facilities and Enforcement Activities Related to the [CWA's NPDES] Program*, *available at* http://www.epa.gov/oecaerth/data/results/performance/cwa/index.html#1. A single "major" facility often has numerous outfalls discharging dozens, if not hundreds, of different pollutants on a near-continuous basis. Aquatic pesticide applications, by contrast, tend to involve the infrequent discharge of one or a few pollutants from a single discharge point.

have nothing to do with insect-borne disease. EPA acknowledges that its projections (done to support the April 2009 stay motion) were assembled quickly, and without peer review, from secondary sources and through the use of generalizing assumptions. Res.App. 22. Almost all of the estimated annual applications are for weed and aquatic vegetation control, and the estimated numbers for these applications are based on expansive assumptions.[18] Applications for mosquito control represent *less than one percent* of the assumed total. *See id.* 23.

C. NPDES Permitting Will Have Substantial Real-World Benefits, Consistent with the Act's Protective Goals.

Although Petitioners strive to characterize it as regulation for regulation's sake, EPA believes that requiring NPDES permits for aquatic pesticide applicators has significant, demonstrable benefits for human and ecological health. *See* Res.App. 12-14 (citing protections afforded by CWA, but not by FIFRA).[19] Unlike the CWA, FIFRA imposes no

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[18] Over 90% of of the total number of estimated applicators are for *assumed* applications to irrigation "ditchbanks," with no indication of how many of these potential applicators *actually* apply (or need to apply) pesticides or whether application to the banks of these ditches would *actually* reach navigable waters.

[19] The agency recently reiterated that "[p]ermit requirements go[ing] beyond the FIFRA label" will yield "environmental benefits." EPA, *CWA Permitting of Discharges from Pesticide*

(Continued on following page)

requirements for site specific analysis of the presence of endangered species, or of whether certain waterways need special protections because of extraordinarily pure conditions (*e.g.*, in wilderness areas) or because they are already polluted at levels toxic to fish and wildlife.[20] Thus, the State of California, in its comments opposing EPA's rule, noted that 27% of its waters were impaired by pesticides and that permitting gave it an important tool to address point source discharges of pesticides. JA 142-43.

Implementation of EPA's permitting program should lead both to the development of newer aquatic pesticides that do their work without leaving residues and to increased reliance on less toxic means of pest control. This is wholly consonant with the Act's "technology-forcing" focus. *NRDC v. EPA*, 859 F.2d 156, 208-09 (D.C. Cir. 1988). Indeed, in the 1971 CWA Senate Report, Senator Dole emphasized the importance of "develop[ing] *alternative means* of pest, weed and fungal control," reducing "[o]ff-target applications," and developing "pesticides which *degrade after*

Applications (Oct. 14, 2009), at 5, *available at* http://www.epa.gov/pesticides/ppdc/2009/october/session-1a.pdf.

[20] In one nationwide study, "[m]ore than one-half of agricultural and urban streams sampled had concentrations of at least one pesticide that exceeded a guideline for the protection of aquatic life," despite regulation by FIFRA, with most samples containing multiple pesticides. U.S. Geological Survey, *The Quality of Our Nation's Waters, Nutrients and Pesticides* (USGS Circular 1225, 1999), at 6, *available at* http://pubs.usgs.gov/circ/circ1225/pdf.

application and *leave no toxic or hazardous after-products*." S.Rep. No. 92-414, at 99 (emphases added).

Two cases illustrate how NPDES permitting can spur the effective use of non-pesticide alternatives. After the Ninth Circuit's 2001 *Headwaters* decision, the Talent Irrigation District switched from a chemical herbicide to mechanical means for controlling aquatic vegetation, thus avoiding the need for an NPDES permit while simultaneously producing improvement in the environmental quality of the waterway. *See* Graham Decl. Supp. Pet'r Opp'n EPA Mot. Stay Mandate ¶¶ 4-8 (5/8/09).[21] And, after a challenge to its unpermitted aquatic pesticide use, Idaho's Gem County Mosquito Abatement District eliminated the direct discharge of chemical pesticides to water, implemented programs to reduce mosquito habitat, and significantly reduced pesticide use overall. *See* Dill Decl. Supp. Pet'r Opp'n EPA Mot. Stay Mandate ¶¶ 6-7 (5/8/09). This approach has proven successful in controlling pests and insect-borne disease: Gem County has experienced a *decrease* in the incidence of West Nile virus. *Id.* ¶ 7.

Petitioners offer no reason why public and environmental health will not be best served by mandating compliance with the provisions of both

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[21] *Headwaters* also illustrates the serious potential harm from aquatic pesticide use. one application of chemical herbicide to control aquatic weeds killed over 92,000 juvenile steelhead along a five mile stretch in Bear Creek, a tributary to the famous Rogue River fishery in Oregon. *See* 243 F 3d at 528.

FIFRA and the CWA. There is nothing unsound about the proposition that the use of potentially toxic pesticides should be conducted as safely as possible. The only major potential disruption here appears to be to the pesticide manufacturers' sales, which places these entities in no different position from the myriad other commercial enterprises regulated under the Act.

CONCLUSION

The petitions for *certiorari* should be denied.

Respectfully submitted,

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JANUARY 11, 2010

APPENDIX A

No. 99-35373

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HEADWATERS, INC., et al.,
Plaintiffs-Appellants,

v.

TALENT IRRIGATION DISTRICT,
Defendant-Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

QUESTION PRESENTED

Whether compliance with a pesticide label approved under the Federal Insecticide, Fungicide, and Rodenticide Act satisfies the otherwise-applicable requirements of the Clean Water Act governing the discharge of a pollutant into the waters of the United States.

INTRODUCTION

Pursuant to Fed. R. App. Pro. 29(a), the United States submits this brief amicus curiae on behalf of

the Environmental Protection Agency (EPA), the federal agency that administers both the Clean Water Act (CWA), 33 U.S.C. 1251 et seq., and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 et seq. In this case, the district court mistakenly concluded that the absence of instructions on a pesticide label approved by EPA under FIFRA directing the user to obtain a CWA permit eliminates the need for a permit under the CWA. The United States submits this brief to explain the distinct nature of the CWA and FIFRA programs administered by EPA, and to explain that compliance with one statute does not mean compliance with the other.

The CWA and FIFRA create two separate regulatory regimes which address distinct environmental problems. The CWA is designed to restore and maintain water quality by requiring pollutant dischargers to obtain permits for point source discharges into interstate water systems. 33 U.S.C. 1251, 1342. FIFRA, by contrast, is designed to protect against the environmental and health harms caused by pesticides by establishing nationally uniform pesticide labeling and nationally uniform pesticide use regulation. 7 U.S.C. 136a. Neither statute contains any provision suggesting that EPA will make CWA permitting decisions in the course of approving pesticide product labels under FIFRA. Indeed, such an approach would be infeasible. Congress envisioned that FIFRA would promote nationally uniform pesticide regulation and labeling, while Congress envisioned that the CWA's permitting process would allow individualized

determinations of appropriate pollutant discharge levels for individual bodies of water. EPA cannot make blanket determinations through its label approval process of whether, or under what conditions, it is safe to discharge a particular pesticide into a particular water body. Instead, the CWA's permit process is designed to provide a forum for those types of fact-specific determinations.

Approval of a pesticide under FIFRA thus does not speak to the question of whether a permit is required under the CWA to discharge the pesticide into the waters of the United States. Indeed, EPA has construed the two statutes as requiring distinct analyses and has issued a public notice that compliance with the instructions on a FIFRA-approved label does not obviate the need for a permit unde [sic] the CWA. That reasonable interpretation is entitled to deference. As a result, the district court's decision must be reversed.

BACKGROUND

1. Statutory background.

a. The Clean Water Act. The CWA establishes a national objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). To achieve that goal, CWA section 301(a), 33 U.S.C. 1311(a), imposes

a prohibition on the discharge of all pollutants[1] from point sources[2] into the navigable waters,[3] except in compliance with the permitting programs established under the Act.

Among the CWA programs that establish an exception to the general prohibition on the discharge of all pollutants, CWA section 402 establishes a permit program administered by the EPA and by approved states under the National Pollution Discharge Elimination System (NPDES). 33 U.S.C. 1342. Under the NPDES program, EPA and approved state

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[1] The CWA defines "pollutant" as:

> dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

33 U.S.C. 1362(6). EPA has listed acrolein, found in Magnacide H, as a hazardous substance, 40 C F.R 116.4 Table 116.4A, and as an organic toxic pollutant. 40 C.F.R. Part 122 App. D, Table II.

[2] The CWA defines a "point source" as

> any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

33 U.S.C. 1362(14)

[3] The CWA defines "navigable waters" as all waters of the United States, including the territorial seas. 33 U.S.C. 1362(7). See also 40 C.F.R. 122.2.

environmental agencies may issue NPDES permits for the discharge of pollutants "upon condition that such discharge will meet either (A) all applicable requirements [under the CWA], or (B) * * * such conditions as the Administrator determines are necessary to carry out the provisions of this chapter." 33 U.S.C. 1342(a).

Under the NPDES program, EPA may impose national "effluent limitations," 33 U.S.C. 1311, on the "quantities, rates, and concentrations" of identified pollutants from particular point source categories, 33 U.S.C. 1362(11). In the absence of such uniform limitations, "the Agency is authorized under CWA § 402(a)(1), 33 U.S.C. 1342(a)(1), to develop such limitations in an NPDES permit on a case-by-case basis." *American Mining Congress v. USEPA*, 965 F.2d 759, 762 n.3 (9th Cir. 1992). Even when a national effluent limitation has been promulgated, such guidelines can "be modified to take account of special characteristics of subcategories of point sources." *NRDC v. Costle*, 568 F.2d 1369, 1378 (D.C. Cir. 1977). Accordingly, the decision whether to issue an NPDES permit, the rates and quantities of pollutant discharges allowed under the permit, and the conditions under which such discharges will be allowed, ordinarily take into account the specific environmental conditions affected by a project involving pollutant discharges.

CWA section 309, 33 U.S.C. 1319, establishes state and federal enforcement mechanisms for the violation of section 301's prohibition on the discharge

of pollutants without a permit. CWA section 355, 33 U.S.C. 1365, authorizes citizen suit enforcement by affected individuals.

b. The Federal Insecticide Fungicide and Rodenticide Act. First enacted in 1947, FIFRA establishes a federal program for the regulation of pesticides. As amended, FIFRA requires that pesticide manufacturers must register their products with EPA. 7 U.S.C. 136a(a). In applying for pesticide registration, manufacturers submit data on the effects of the pesticides on public health and the environment and must also submit a draft product label. 7 U.S.C. 136a(c).

Under FIFRA, EPA may register a pesticide only if it determines that:

> (A) its composition is such as to warrant the proposed claims for it;
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> (B) its labeling and other material required to be submitted comply with the requirements of this subchapter;
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> (C) it will perform its intended function without unreasonable adverse effects on the environment; and
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> (D) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.

7 U.S.C. 136a(c)(5). To determine whether a pesticide causes "unreasonable adverse effects on the environment," EPA conducts a cost-benefit analysis, examining

"the economic, social, and environmental costs and benefits of the use" of the pesticide. 7 U.S.C. 136(bb).

FIFRA mandates nationally uniform pesticide labels for a product. 7 U.S.C. 136v. Pesticide labels must not be false or misleading, 7 U.S.C. 136a(c)(9), must contain certain cautionary statements mandated by regulations, and must provide comprehensible directions for use. See 40 C.F.R. Part 156.

2. Factual background. The following facts were found by the district court. The Talent Irrigation District (TID) is an Oregon municipal corporation which operates a system of irrigation canals. Slip Op. 2. The canals take water from Bear Creek and other surface waters of Oregon, and discharge back into those waters. *Id.* at 3. To kill weeds and algae that grow in the canals, TID applies a pesticide, Magnacide H, directly into the canals. *Id.* at 2. TID's use of the pesticide, which includes the toxic chemical acrolein, has allegedly been linked with massive fish-kills, including a 1996 incident in which over 92,000 juvenile steelhead salmon were found dead. *Id.* at 3. TID has not obtained a permit under the CWA's NPDES program, 33 U.S.C. 1342, for the discharge of pollutants into the waters of the United States.

Headwaters, Inc., along with Oregon Natural Resources Council Action, (hereinafter "Headwaters"), brought a citizens suit action under 33 U.S.C. 1365. Headwaters alleges that TID violates the CWA by discharging the pollutant acrolein without an NPDES permit.

3. Procedural background. On February 1, 1999, the United States District Court for the district of Oregon (Aiken, J.), granted TID's motion for summary judgment. The court found that Headwaters established all elements of a CWA violation. Thus, the court found that TID is a "person" under the CWA, Slip Op. at 5, that TID's canals constitute "navigable waters" under the Act, *id.* at 7-11, that Magnacide H contains the "pollutant" acrolein, *id.* at 11-12, and that TID had discharged acrolein from a "point source," *id.* at 5.

The court granted summary judgment in favor of TID, however, because it found that the unpermitted discharge of acrolein into the navigable waters was "otherwise authorized by law." *Id.* at 12-19. Specifically, the court found that TID had followed the instructions on the Magnacide H label, which was approved by EPA under FIFRA. That label did not include an instruction that TID obtain an NPDES permit. As the court stated, the discharge of acrolein in aquatic herbicides "is adequately regulated and controlled by FIFRA and the EPA thus making further regulation by [the Clean Water] Act unnecessary." *Id.* at 12. The court found that "to give effect to both FIFRA and the Act" it "must construe the EPA-approved label on Magnacide H as an indication that an applicator of Magnacide H does not need a NPDES permit." *Ibid.* In support of that conclusion, the court pointed to the EPA-approved pesticide label of another aquatic pesticide, which included the statement that an NPDES permit may be required to discharge

the pesticide into public waters. *Id.* at 13. Because the label for Magnacide H includes no such statement, the court reasoned, EPA must have concluded that no NPDES permit is required in order to discharge the pesticide. Finding that TID followed the label instructions, the court granted it summary judgment.

SUMMARY OF ARGUMENT

The district court erred in concluding that compliance with the Federal Insecticide Fungicide and Rodenticide Act (FIFRA) obviates the need for a permit under the Clean Water Act (CWA). Nothing in either statute supports that conclusion. FIFRA and the CWA establish separate statutory programs, serve distinct purposes, and call for very different environmental analyses. FIFRA establishes nationally uniform pesticide regulation and labeling, requiring EPA to weigh the economic benefits of registering a pesticide against the environmental harms associated with the pesticide's use. The CWA, in contrast, ordinarily calls for a case-by-case analysis of the environmental effects of particular discharges of a pollutant into a particular water body. Except where it is mandated by statute, EPA's approval of a pesticide label under FIFRA does not involve analysis of whether, or under what conditions, the use of the pesticide would be consistent with other statutes EPA administers.

The two statutes are easily compatible: a person seeking to discharge a pollutant into a public water body from a point source may comply with both FIFRA and the CWA by following the directions on a pesticide label approved under FIFRA *and* by obtaining a permit when required by the CWA. The district court erred in concluding that compliance with a pesticide label alone satisfies both statutes.

ARGUMENT

COMPLIANCE WITH FIFRA DOES NOT ELIMINATE THE NEED TO OBTAIN AN NPDES PERMIT UNDER THE CWA

As the Supreme Court has stated, "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Where two statutes overlap, "the proper approach * * * is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963).

There is no conflict between the CWA and FIFRA. Notwithstanding the district court's suggestion to the contrary, it is not unusual that a subject like pesticide use is addressed by two different statutory programs. As the D.C. Circuit has stated, "the provision of multiple regulatory authorities is far from unknown." *Environmental Defense Fund v. EPA*,

598 F.2d 62, 77-78 (D.C. Cir. 1978). The two statutes are easily "capable of co-existence": a person who seeks to discharge a pesticide into the waters of the United States from a point source must comply with *both* statutes by following the instructions on the pesticide label *and* by obtaining an NPDES permit when required by the CWA. The district court erred in concluding that compliance with the approved instructions on a pesticide label satisfies both statutes.

A. Two Distinct Analyses Are Required to Determine Compliance with FIFRA and Compliance with the CWA

Nothing in FIFRA or the CWA remotely suggests that compliance with FIFRA also means compliance with the CWA. Indeed, the CWA and FIFRA address different concerns and establish different regulatory programs, necessitating distinct analysis under each statute. The CWA seeks "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). To accomplish that goal, the CWA establishes a permitting process – the NPDES process, 33 U.S.C. 1342 – under which a permit is required in order to discharge pollutants from a point source into the navigable waters. FIFRA, by contrast, seeks to ensure uniform pesticide labeling and to protect human health and the environment from the harms caused by pesticides. To establish that goal, FIFRA requires pesticide manufacturers to register their products with EPA and requires

pesticide users to comply with the instructions on a pesticide label. 7 U.S.C. 136a, 136j(a)(2)(G).

The two statutes require different environmental analyses [sic] FIFRA requires evaluation of whether a pesticide may cause "unreasonable adverse effects on the environment." 7 U.S.C. 136a(c)(5). EPA may register a pesticide under FIFRA only if the economic and social benefits brought by a pesticide outweigh the environmental harms caused by pesticide use. 7 U.S.C. 136(bb). Under the CWA, EPA may permit the discharge of a pollutant only if it will satisfy the effluent limitations imposed on the basis of available technology and any other conditions imposed by EPA to protect water quality. 33 U.S.C. 1342(a). Pollutant discharges may not satisfy the CWA standards even though they involve the discharge of pesticides registered under FIFRA.

Moreover, the two statutes differ fundamentally because FIFRA establishes nationally uniform pesticide labeling and nationally uniform pesticide regulation, 7 U.S.C. 136v, while the NPDES program permits particular discharges into particular water bodies, which ordinarily must be determined on a case-by-case basis. *American Mining Congress v. USEPA*, 965 F.2d 759, 762 n.3 (9th Cir. 1992); *NRDC v. Costle*, 568 F.2d 1369, 1378 (D.C. Cir. 1977).[4] Even

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[4] Under the CWA, EPA may issue nationally applicable general permits from point sources that (1) all involve the same or similar types of operations; (2) discharge the same types of

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when an NPDES permit enforces nationally applicable technology-based effluent limitations, EPA may prescribe other conditions to protect the particular water quality values that may be disturbed by a particular pollutant discharge. 33 U.S.C. 1342(a)(2).

Given these differences in the programs established by FIFRA and the CWA, it is plain that registration of a pesticide under FIFRA does not take into account the range of considerations necessary for determining whether a particular discharge of a pesticide into a particular water body should be permitted under the NPDES program. In performing the generalized cost-benefit analysis under FIFRA, EPA is not required to take into account the effluent limitations established by the CWA and could not practically consider the particular environmental conditions existing at a particular water body. Because the NPDES permitting process ordinarily calls for a case-by-case analysis of the effects of particular discharges into particular water bodies, it would be altogether infeasible for EPA to use the FIFRA registration process to ensure that all relevant CWA requirements are met.

The need for separate analyses under the CWA and FIFRA is equally true for pesticides such as Magnacide H, which are applied directly into waters. In approving the registration of that pesticide, EPA

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wastes; and (3) require the same or similar monitoring. 40 C.F.R. 122.28.

concluded that the overall economic benefits of allowing the use of the product outweigh adverse environmental effects. EPA did not analyze, was not required to analyze, and could not feasibly have analyzed, whether, or under what conditions, the product could be discharged from a point source into particular public water bodies in compliance with the CWA. In approving the registration of Magnacide H, EPA did not warrant that a user's compliance with the pesticide label instructions would satisfy all other federal environmental laws. Indeed, EPA approves pesticides under FIFRA with the knowledge that pesticides containing pollutants may be discharged from point sources into the navigable waters only pursuant to a properly issued CWA permit.

In two provisions, FIFRA does require EPA to consider the applicability of other statutes, but neither provision involves the CWA. In determining whether a pesticide constitutes an "imminent hazard," EPA must consider whether the pesticide will pose hazards to species listed as endangered or threatened under the Endangered Species Act, 16 U.S.C. 1531 et seq. 7 U.S.C. 136(*l*). Similarly, in determining whether use of a pesticide may leave harmful residues on food, EPA must consider the standards established by the Federal Food and Drug Control Act, 21 U.S.C. 346a. 7 U.S.C. 136(bb). The explicit requirements that EPA consider other statutes in approving a pesticide under FIFRA, and the absence of any requirement that EPA consider the CWA in approving a pesticide under FIFRA, suggests

that Congress had no intent to require EPA to consider the CWA in making FIFRA decisions.

In granting summary judgment to TID, the district court relied on an EPA fact sheet for a pesticide containing copper sulfate, which mandated the inclusion of a label statement that an NPDES permit would be required to discharge the pesticide into navigable waters. Slip Op. 13. The district court reasoned that, because the Magnacide H label approved by EPA does not contain a similar statement, EPA must have concluded that no NPDES permit would be required. That reasoning is faulty. While EPA may on occasion require pesticide manufacturers to include statements on their labels regarding the application of laws other than FIFRA, nothing in FIFRA or the CWA requires that EPA must do so. The absence of such a statement on a pesticide label does not mean that EPA has concluded that use of the pesticide is always consistent with all other statutes. Indeed, EPA has issued a public notice that the absence of a label statement regarding the possible need for a NPDES permit "does not relieve a producer or user of such products from the requirements of the Clean Water Act." Pesticide Regulation (PR) Notice 95-1 (May 1, 1995), available at http://www.epa.gov/opppmsd1/PR_Notices/pr95-1.html. As discussed below, EPA deserves deference for that reasonable construction of the statutes it administers.

B. This Court's Cases Hold that Compliance with FIFRA Does Not Obviate the Need to Comply with Other Environmental Laws

The district court's decision is inconsistent with this Court's cases. As this Court has made clear, compliance with FIFRA does not relieve a party of its independent obligations under other statutes. Thus, this Court has twice held that EPA's registration of a pesticide under FIFRA does not relieve an agency of its independent obligations under the National Environmental Policy Act (NEPA), 42 U.S.C. 4321-4370C. NEPA requires federal agencies to analyze the environmental impacts of major federal actions. 42 U.S.C. 4332. When an agency plans to use a pesticide approved by EPA under FIFRA, the agency cannot rely on the environmental analysis conducted in the FIFRA registration process. This Court thus stated: "[T]he mere fact that a program involves use of substances registered under FIFRA does not exempt the program from the requirements of NEPA." *Oregon Environmental Council v. Kunzman*, 714 F.2d 901, 905 (9th Cir. 1983). See also *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1248 (9th Cir. 1984). As this Court recognized, the analysis required under NEPA to examine a specific application of a pesticide is not equivalent to the more generalized analysis required under FIFRA. See *ibid.* ("The EPA registration process for herbicides under FIFRA is inadequate to address environmental concerns under NEPA."). See also *Dithiocarbamate Task Force v. Environmental Protection Agency*, 98 F.3d 1394, 1401 (D.C. Cir. 1994)

(holding that EPA analysis under FIFRA is inadequate to satisfy RCRA).[5]

The same conclusion applies here. The environmental analysis necessary to register a pesticide under FIFRA is not equivalent to the analysis required to determine whether a pollutant may be discharged under the CWA. As a result, EPA's approval of a pesticide under FIFRA does not mean that it may be used without a CWA permit.

The district court's decision has the effect of holding that FIFRA repeals by implication the CWA's requirement for a NPDES permit. As the Supreme Court has held, however, "[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Mancari*, 417 U.S. at 551. No repeal by implication may be found here because FIFRA and the CWA are not irreconcilable. A pesticide user may comply with both statutes by following the instructions

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[5] When EPA registers a pesticide under FIFRA, its FIFRA analysis does satisfy its obligations under NEPA to examine the environmental impacts of the registration itself. See *Merrell v. Thomas*, 608 F. Supp. 644 (D. Or. 1985), aff'd 807 F.2d 776 (9th Cir. 1986). The *Merrell* court clearly understood, however, that separate analysis under NEPA may be required for a specific application of a pesticide: "[A]n agency engaged in a program of pesticide use, to which NEPA does apply, cannot rely solely on a FIFRA registration as a substitute for its own obligation to prepare an impact statement analyzing the environmental impacts of using a certain herbicide in a given location." 608 F. Supp. at 646.

on the pesticide label and, where the use of the pesticide constitutes the discharge of a pollutant from a point source into the navigable waters, the pesticide user must also obtain an NPDES permit.[6]

C. EPA Deserves Deference for Its View that Compliance with FIFRA Does Not Satisfy the CWA

The agency that administers a statute is entitled to deference for its reasonable resolution of statutory silence or ambiguity. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-843 (1984). As discussed above, nothing in the CWA and FIFRA establish that compliance with the instructions on a pesticide label relieves a party of the need for a permit under the CWA. If this Court were to find any ambiguity in the statutes on this question, however, the Court must nonetheless defer to the reasonable conclusion of EPA, which administers both statutes, that compliance with FIFRA does not necessarily satisfy the requirements of the CWA.

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[6] It has been held that other federal statutes do not repeal by implication the application of the CWA. See *Hudson River Fishermen's Association v. City of New York*, 751 F. Supp. 1088, 1099-1100 (S.D.N.Y. 1990) ("Clearly, the Safe Drinking Water Act does not provide adequate justification for ignoring the express and unambiguous directive of the previously adopted Clean Water Act."); *Environmental Defense Fund v. EPA*, 598 F.2d 62-77-78 (D.C. Cir. 1978) (Toxic Substances Control Act does not repeal by implication provision of CWA)

EPA has consistently recognized that compliance with FIFRA does not ensure compliance with other environmental statutes. EPA thus concluded that registration of a pesticide under FIFRA "does not mean, however, that materials treated with pesticides should not be managed in a controlled manner under RCRA [the Resource Conservation and Recovery Act, 42 U.S.C. 6901-6992k]." 55 Fed. Reg. 11,798, 11,839 (March 29, 1990).[7] Similarly, pesticides may be regulated by EPA under both FIFRA and the Clean Air Act. See 58 Fed. Reg. 28,094 (May 12, 1993). The same is true for the CWA; compliance with FIFRA does not ensure compliance with the CWA. See 55 Fed. Reg. 50450, 50451 (1990) ("If Congress intended either FIFRA or the CWA to be the exclusive statutory basis for regulating several aspects of the wood preserving industry, the relevant statutes would have so stated."); *id.* at 50462 ("[W]hile labeling under FIFRA is one mechanism that could be used to regulate certain wood treatment drippage and spills, the Agency does not agree that it is the best or only approach.").

EPA's construction of the statutes it administers is reasonable and is entitled to deference. In enacting FIFRA, Congress mandated that pesticide users must comply with the label instructions on registered

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[7] See also *id.* at 11,838 ("[T]hese wastes may be regulated under both FIFRA and RCRA."); 58 Fed. Reg. 8102, 8114 (Feb. 11, 1993) ("[B]oth FIFRA and RCRA requirements may apply to the pesticide waste."); 55 Fed Reg. 11798, 11838 (March 29, 1990); 50 Fed. Reg. 18,622, 18625 (May 1, 1985) ("[T]he statutory standards under RCRA and FIFRA are different.").

pesticides; in enacting the CWA, Congress mandated that pollutants may only be discharged into the navigable waters from a point source with a permit. Putting these two statutory schemes together, EPA reasonably concludes that FIFRA labeling does not relieve the pesticide user from the obligation to comply with any applicable permitting requirements of the CWA. That reasonable conclusion deserves deference.

The contrary conclusion suggested by the district court threatens to do considerable damage to EPA administration of FIFRA. The district court's decision suggests that, in order to register a pesticide under FIFRA, EPA must determine whether the use of the pesticide would be consistent with the CWA and, perhaps, with all statutory programs administered by EPA. Requiring such determinations would significantly increase the burden on EPA in administering FIFRA and would require a significant increase in resources in order to do so, since a pesticide registration would have to be reviewed by many other offices in EPA.[8] In addition to the considerable resource

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[8] Although the district court's decision is not altogether clear on this point, EPA perhaps could comply with the district court's understanding of the interrelationship between FIFRA and other statutes administered by EPA by requiring that all pesticide labels bear a statement that pesticide users must comply with other applicable laws. Requiring such a statement on all pesticide labels would impose considerable costs on all pesticide manufacturers, who would have to re-label all pesticide packages that lack such a statement. Nothing in FIFRA, however, imposes a requirement that labels bear warnings regarding the application of other laws. See 7 U.S.C. 136(q)

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implications of the district court's ruling, the decision suggests that FIFRA provides EPA with authority to extend or restrict the jurisdiction of other statutes. That suggestion is at odds with both FIFRA and the CWA. In order to register a pesticide under FIFRA, EPA must determine only that it meets the criteria spelled out in FIFRA; it need not consider the reach of other statutes that may also govern the use of such pesticides in certain circumstances.

CONCLUSION

For the foregoing reasons, the district court's ruling should be reversed.

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(defining misbranded labels); 40 C.F.R. Part 156 (establishing FIFRA label requirements).

APPENDIX B

September 23, 2009 – Draft

The following table provides EPA's current estimates of the number of applicators and applications of pesticides that fall within pesticide use patterns that result in the application of pesticides to and over, including near, waters of the United States. The information has not undergone peer review, and EPA intends to update these estimates as additional data become available.

There are two main limitations to the data provided. First, there is not a direct source of information on the number of applicators and applications made for these pesticide use patterns. As a result, the estimates were derived from secondary sources of information, and generalizing assumptions were sometimes made. The second limitation is that the definition of an application and an applicator is derived from the best available data by use pattern. Therefore the definition may be different by use pattern. More detail, by pesticide use pattern, is provided in the calculation notes.

Following the table is a listing of information sources used in EPA's estimation of the number of pesticide applicators and applications. Information sources are listed by pesticide use pattern.

NPDES Applicator & Application Estimates

Use Patterns	Number of Applicators	Number of Applications	Calculation Notes
Mosquito Adulticides	1,200	461,450	There are 400 mosquito abatement districts and approximately 800 other public agencies that apply mosquito control pesticides – it is assumed that each represents an applicator. There were 103 million acre-treatments with insecticides in 2005 (99 million for adulticides and 4 million for larvicides). Assuming that 77% of adulticide applications are made by ground and 23% are made by air and that an average adulticide application by ground covers 180 acres and that an adulticide application by air covers 600 acres, there are an estimated 461,450

			annual adulticide applications.
Mosquito Larvicides	1,200	18,800	There are 400 mosquito abatement districts and approximately 800 other public agencies that apply mosquito control pesticides – it is assumed that each represents an applicator. There were 103 million acre-treatments with insecticides in 2005 (99 million for adulticides and 4 million for larvicides). Assuming that 77% of larvicide applications are made by ground and 23% are made by air and that an average larvicide application by ground covers 180 acres and that a larvicide application by air covers 600 acres, there are an estimated 18,800 annual larvicide applications.

Aquatic Weed Control – Lakes and Ponds	23,200	4,524,000	OPP data show approximately 23,200 applicators holding certification in the aquatic category. The estimate of applications to lakes, ponds, irrigation systems and waterways is the result of 23,200 multiplied by 1 application per day over 195 work days (5 work days per week multiplied by 39 weeks [9 months of the year]), which equals 4,524,000 applications per year. EPA cannot determine what applications are made to each site, so one overall number has been calculated for all aquatic weed control in lakes, ponds, irrigation systems, and waterways.

Aquatic Weed Control – Irrigation Systems and Waterways	See Aquatic Weed Control – Lakes and Ponds	See Aquatic Weed Control – Lakes and Ponds	See Aquatic Weed Control – Lakes and Ponds
Aquatic Weed Control – Ditchbanks	330,000	660,000	About 15%, or 330,000, of 2.2 million U.S. farms are irrigated. EPA assumes that each farm is treated twice per year. This does not account for types of irrigation.
Aquatic Nuisance Animal Control	Not Available	Not Available	Includes use of pesticides for the control of fish, lampreys, and mollusks. EPA currently does not have an estimate of the number of applicators and applications within this use pattern.
Wide Area Pest Control – Insects	170	5,000	Based on grasshopper & Mormon cricket control. Estimate of 5 million acres treated with a minimum of 1,000 acres per application. This is a low estimate because

			it does not include east of the Mississippi, and parts of west. Number of applicators is based on NAAA survey estimate of available aircraft.
Wide Area Pest Control – Invasive Weeds	5,000	10,000	Herbicides are usually not feasible for control of large wide area infestations. They are most likely used to control and/or eradicate smaller newer infestations. Applicators may be individual landowners or government agencies. No data is available for number of applicators and applications, but EPA estimates that there are at least 5,000 applicators and 10,000 applications, and that these estimates may be low.
Forestry	4,500	4,500	There are 5,175 tracts of forest in the U.S. and 2.7 million acres of

			forest are treated per year. Assuming that an average pesticide application to forests is 600 acres (based on NAAA survey), the number of applications is calculated as the number of acres treated per year divided by the number of acres treated per application. It is assumed that the 4,500 applications are evenly distributed across the 5,175 forest tracts, thus it is assumed that there is one applicator per treated tract. The estimate of the number of applications and applicators may be low because data are not available on pesticides applied by ground.
Total	365,270	5,683,750	

NPDES Applicator & Application Information Sources

Mosquito Control

CDC, 2009. Infectious disease information: Mosquito-borne diseases. U.S. Centers for Disease Control and Prevention. Available online at: http://www.cdc.gov/ncidod/diseases/list_mosquitoborne.htm

EPA Proprietar Marketing Research Data.

EPA and CDC, 2007. Joint statement on mosquito control in the United States. U.S. Environmental Protection Agency and the U.S. Centers for Disease Control and Prevention. Available online at: http://www.epa.gov/opp00001/health/mosquitoes/mosquitojoint.htm

Florida Coordinating Council on Mosquito Control, 1998. Florida mosquito control: The state of the mission as defined by mosquito controllers, regulators, and environmental managers, University of Florida, Vero Beach, FL.

NAAA, 2004. Pesticide use survey report for agricultural aviation. National Agricultural Aviation Association, Washington, DC.

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In the Supreme Court of the United States

CROPLIFE AMERICA, *et al.*,

Petitioners,

v.

BAYKEEPER, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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INTRODUCTION

As the government agrees, the Sixth Circuit got it wrong when it invalidated the Final Rule at issue in this case on the remarkable ground that the Clean Water Act (CWA) *unambiguously* mandates National Pollutant Discharge Elimination System (NPDES) permitting for the use of pesticides in, over, or near waters. Gov't Resp. 9, 10-12. As the government observes, that ruling is directly at odds with "the Act's silence" on the question presented, the United States Environmental Protection Agency's (EPA) "longstanding practice"—since the enactment of the CWA—of *not* requiring permits for such discharges, and "FIFRA's specific regulation of pesticide use." *Id.* at 2, 11. And because the Sixth Circuit rested its decision on the first step of *Chevron*, the decision completely usurps the agency's authority to take a different regulatory approach to pesticide applications in, over, or near the waters of the United States—a category of discharges that is vitally important to the Nation's public health and agricultural economy. That profoundly misguided and extraordinarily disruptive decision warrants further review by this Court.

While agreeing that the decision is wrong, the government ultimately opposes certiorari based on a "Nothing to see here folks, just a *Chevron* violation!" approach. *See id.* at 9, 12-13. That response rings particularly hollow coming from the government. There is no more ardent or persistent institutional proponent of the importance of the *Chevron* doctrine than the Office of the Solicitor General. And in any event, this case does not involve a "mere" misapplication of *Chevron*. The Sixth Circuit's manifest disregard for *Chevron* and the fundamental

principles on which *Chevron* is grounded not only led it to categorically invalidate an executive regulation (itself a grave Judicial act), but to single-handedly mandate the largest expansion of the NPDES permitting program in the history of the CWA. Indeed, the government itself acknowledges that, if given effect, this ruling—which "make[s] the NPDES permitting regime applicable to *thousands* of pesticide applications that were not previously subject to CWA requirements"—will result in "significant disruption to both regulators and the regulated community." *Id.* at 15 (emphasis added). To say the least.

The government half-heartedly suggests that the extraordinary *two-year* stay entered by the Sixth Circuit—which itself underscores the magnitude of the decision below—will "reduce[]" the "significant disruption" and "adverse consequences" stemming from that decision and that the government "should" be able to develop a new "general" permitting regime to deal with the aftermath. *Id.* at 15-16. But, as explained below, EPA's permits would only cover *four* states; the other 46 states would have to devise their own solution. More fundamentally, as emphasized by the wide array of *amici* who have filed in support of certiorari, the administrative burdens and potential public health risks associated with a general permitting regime could have potentially grave consequences. The fact that the government *may* be able to somehow "reduce[]" (*id.* at 15) the serious adverse impact of the decision below by hurriedly erecting a new regulatory regime that was never envisioned (much less mandated) by Congress is no reason for this Court to deny review of the misguided decision that improperly and unwisely imposes that regime to begin with.

Finally, the government's passing suggestion (at 12) that the purported absence of a conflict provides a reason for denying review is unavailing. As petitioners have explained, the decision below *does* conflict with the decisions of this Court and other circuits. But, in any event, the decision below represents the final say on petitions for review challenging the Final Rule filed in *eleven* different circuits and consolidated by the Judicial Panel for Multidistrict Litigation before the Sixth Circuit in this case. This case therefore represents the whole ball game as far as the validity of that Rule is concerned. And the Sixth Circuit got it so wrong—at so much cost—that its decision invalidating the Rule practically cries out for this Court's review.

ARGUMENT

I. AS THE GOVERNMENT RECOGNIZES, THE SIXTH CIRCUIT'S DECISION IS UNTENABLE

Despite Baykeeper's vehement defense of the decision below, the Sixth Circuit's conclusion that the CWA *unambiguously* forecloses EPA's rule is—as the government recognizes (at 10)—simply untenable.

The Sixth Circuit erroneously concluded that the terms "chemical waste" and "biological materials" in CWA's definition of "pollutant" unambiguously encompass pesticides. *See* Pet.App.15a. In so finding, the court ignored numerous indicia of congressional intent, including: (1) the import of the only provision in the CWA that expressly refers to pesticides, *see* 33 U.S.C. §1254(*l*); Pet.App.77a-78a; (2) the significance of FIFRA—the statute designed to regulate the use of pesticides; (3) legislative history suggesting that pesticide residuals should be addressed through the

regulation of nonpoint sources rather than through NPDES, *see* Cong. Amicus Br. 7, and (4) the fact that Congress completed two major reauthorizations of the CWA without touching EPA's longstanding policy of excluding pesticide applications from NPDES permitting, *see* CropLife Pet. 26-27.

The Sixth Circuit's treatment of biological pesticides is particularly egregious. The Sixth Circuit found that Congress intended "to treat biological and chemical pesticides differently" and that the term "biological materials" *unambiguously* includes biological pesticides even when they do not leave excess or residuals in the water. Pet.App.15a, 18a-20a. That interpretation is at odds with the statutory text, conflicts with the Ninth Circuit's interpretation of the term, *see infra* p. 8, and—as the government observes (at 12)—leads to the "peculiar result" of regulating biological pesticides more heavily than chemical pesticides, even though EPA has determined "that biological pesticides generally pose less serious adverse environmental consequences than chemical pesticides."

The Sixth Circuit also erroneously concluded that the CWA *unambiguously* precludes EPA's interpretation that excess or residual pesticide is a nonpoint source pollutant since it becomes "chemical waste" at some point after discharge. As the government explains (at 11), the Sixth Circuit identifies *no* provision in the statute addressing the temporal issue. Rather, the Sixth Circuit reaches its conclusion by applying its own "but for" test, *see* Pet.App.24a, a test not supported in statute and exceeding anything applied by EPA or other courts.

At the same time, the Sixth Circuit's decision flies in the face of "longstanding [agency] practice." Gov't Resp. 2. In the about 40 years since Congress enacted the CWA, EPA has *never* required an NPDES permit for the application of pesticides to, over, or near waters, nor has it "ever stated in any general policy or guidance that an NPDES permit is required for such applications." Pet.App.29a.[1] The fact that the Sixth Circuit's decision mandates a stark departure from longstanding agency practice alone underscores the need for this Court's review. *See, e.g.*, *Morton v. Ruiz*, 415 U.S. 199, 201-02 (1974) (granting certiorari where appellate decision "was inconsistent with long-established [agency] policy").

It is true, as the government notes (at 12), that the Sixth Circuit "recited" the *Chevron* test. But the court went on to fundamentally *depart from* that test. In particular, in undertaking its *Chevron* step one analysis, the court disregarded the tools of statutory construction and implausibly concluded that the provisions at issue were capable of only *one* interpretation—its interpretation. The Sixth Circuit's decision does violence to *Chevron*—"an extremely important and frequently cited opinion," *INS v. Cardoza-Fonseca*, 480 U.S. 421, 454 (1987) (Scalia, J., concurring in judgment)—and arrogates to the courts lawmaking power delegated to the agency. That fundamental departure from *Chevron* warrants review.

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[1] Baykeeper's claim (at 3, 27)—that this longstanding practice represents merely "'enforcement' discretion"—thus cannot withstand scrutiny.

Indeed, because the Sixth Circuit's decision holds that the CWA *unambiguously* resolves the important question presented, that decision now "trumps" any other agency construction and "leaves no room for agency discretion" in administering the statute in this critical sphere. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER COURTS

As noted, the absence of a direct conflict on the Final Rule's validity is a red herring because the decision below resolves petitions for review that were filed in *eleven* different circuits and consolidated for review before the Sixth Circuit.[2] In any event, the Sixth Circuit's decision *does* conflict with the decisions of this Court and other circuits in important respects.

That includes *Burlington Northern & Santa Fe Railway Co. v. United States*, 129 S. Ct. 1870 (2009). While it is of course true that *Burlington Northern* does not directly address the precise question presented here, Gov't Resp. 13; Baykeeper Resp. 9-10, the Sixth Circuit's decision is nevertheless seriously at odds with the Court's analysis in *Burlington Northern* of analogous provisions of CERCLA. In particular, the Sixth Circuit in this case committed the same basic error as the Ninth Circuit in *Burlington Northern* by

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[2] While Baykeeper suggests (at 2) that industry petitioners chose the forum, the Judicial Panel for Multidistrict Litigation chose the Sixth Circuit through a random selection mandated by statute. *See* 28 U.S.C. §2112(a)(3).

glossing over the intent to dispose that is inherent in both the ordinary meaning of the term "waste" here, *see* Pet.App.15a-16a, and "arrange for disposal" in *Burlington Northern*, 129 S. Ct. at 1877, 1879.[3]

The Sixth Circuit's decision also conflicts with the Second Circuit's analysis of the term "solid waste" in the RCRA regulations at issue in *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 205 (2d Cir. 2009). *See id.* at 208 ("[M]aterials put to their ordinary, intended use are not 'abandoned' under the regulatory definition of solid waste ...."). The CWA's permitting program, CERCLA, and RCRA are all designed to regulate the intentional discharge or disposal of waste products. The mandate of these statutes contrasts with that of statutes designed to regulate harms from application of *useful* products, such as FIFRA, the Federal Food Drug and Cosmetic Act (FFDCA) and the Toxic Substances Control Act (TSCA). The Sixth Circuit's treatment of pesticides used in accordance with their FIFRA labels as "wastes" conflicts with this Court's opinion in *Burlington Northern* and the Second Circuit's analysis in *Metacon Gun Club*.

Furthermore, as the government acknowledges (at 12), the Sixth Circuit's decision conflicts with the

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[3] Nor does Baykeeper successfully distinguish this case. Baykeeper Resp. 9-10. *Burlington Northern* held that, "[i]n order to qualify as an arranger, Shell must have entered into the sale of D-D *with the intention that at least a portion of the product be disposed of* during the transfer process." *See* 129 S Ct. at 1880 (emphasis added). So too here, for a pesticide to be a waste, there must be an intention that at least a portion of the pesticide be disposed of.

Ninth Circuit's interpretation of the CWA's term "biological materials." *See Ass'n to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007 (9th Cir. 2002). In *Taylor Resources*, the Ninth Circuit concluded that the CWA definition of "pollutant" is *ambiguous* on whether the term "biological materials" includes all biological matter or is limited to waste, and held—"in accord with the views of other courts that have examined what constitutes 'biological materials' under the Act"—that "'biological materials' means the waste product of a human or industrial process." *Id.* at 1016-17. In contrast, the Sixth Circuit found the term "biological materials" *unambiguously* "cannot be read to exclude biological pesticides or their residuals," Pet.App.19a, even though biological pesticides are not waste.[4]

The Sixth Circuit decision also conflicts with this Court's decision in *Train v. Colorado Public Interest Research Group, Inc.*, in which the Court concluded that the term "radiological materials" in the CWA excluded source, byproduct and special nuclear materials regulated under the Atomic Energy Act noting the significance of the existing regulatory scheme. 426 U.S. 1, 23-25 (1976); *see also* CropLife Pet.

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[4] *Taylor Resources* demonstrates the flaw of Baykeeper's argument (at 6-8) that the Sixth Circuit's decision is "harmonious" with other federal appellate jurisprudence. Furthermore, as the government points out (at 4), neither *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001) nor *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002) "contained a square holding interpreting the term 'pollutant' in a manner inconsistent with the EPA rule that is at issue in this case."

23-25 (discussing the significance of the FIFRA regulatory scheme). Like the Sixth Circuit here (Pet.App.14a-15a), the Tenth Circuit in *Train* found that the statutory definition at issue unambiguously included "all radioactive materials" because the reference to "radioactive materials" did not contain an express qualification or exception. 426 U.S. at 9. This Court disagreed. *Id.* at 9-10, 23-25.

III. THE POTENTIALLY DEVASTATING PRACTICAL CONSEQUENCES OF THE DECISION BELOW UNDERSCORE THE NEED FOR REVIEW

The government acknowledges (at 15) that the decision below will cause "significant disruption to both regulators and the regulated community," but suggests that certiorari is not warranted because the extraordinary two-year stay will "*reduce*[]" the potentially devastating impact of that decision. (emphasis added). That argument should be rejected.

To begin with, EPA only administers NPDES general permitting in *four states*.[5] Pet.App.118a. Thus, while EPA assures this Court that the stay will allow EPA to develop a new general permitting regime to cover the "thousands of pesticide applications" (Gov't Resp. 15) that now require permits, EPA cannot speak for the remaining *46 states* that administer

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[5] Those states are: Idaho, Massachusetts, New Hampshire, and New Mexico. EPA also administers permits in the District of Columbia and certain federal territories and lands. EPA, NPDES, *State and Tribal Program Authorization Status*, http://cfpub.epa.gov/npdes/statestribes/astatus.cfm (last visited Jan. 21, 2010).

NPDES general permitting and will be required to act as well. Moreover, as EPA has recognized, these States already face budgetary pressures and other constraints that challenge their NPDES programs. Pet.App.131a. Accordingly, even if EPA erects a new general permitting regime within two years, pesticide applicators in any one of the 46 authorized NPDES States may well find themselves without an available permit when the mandate issues.

Moreover, there is no guarantee that state or federal general permits will fully accommodate this important and widespread area of activity. The scope of activities swept into the NPDES permitting requirement by the decision below is breathtaking. Indeed, EPA estimates that even a narrow reading of the Sixth Circuit's decision will require NPDES permits for roughly 5.6 million pesticide applications per year by approximately 365,000 pesticide applicators. Pet.App.127a. For example, the Sixth Circuit's mandate will expand NPDES permitting to include: (1) pesticide applications by roughly 1,200 Mosquito Abatement Districts, Pet.App.135a; (2) pesticide applications by America's farmers, such as the application of herbicides to combat weeds in irrigation systems and agricultural drainage systems, which are critical to agricultural production, *see* Pet.App.126a-27a; and (3) numerous other activities, such as protecting forests from Gypsy moths, protecting the endangered Florida Manatee's habitat by controlling invasive plant species in waterways, and preventing pest infestation and overgrown vegetation from interfering with the use of Coast Guard navigational aids, Pet.App.157a-58a, 166a.

The NPDES permitting mandated by the Sixth Circuit will deprive these applicators of the flexibility that is crucial for most pesticide applications. For example, mosquito control requires tremendous flexibility in deciding how, when and what type of pesticide to apply since pest outbreaks and mosquito borne disease crises, by nature, are unplanned. Public health officials often have only a few hours to a day or two to respond to an outbreak. AMCA Amicus Br. 6. Likewise, farmers often must adjust pesticide applications in rapid response to unpredictable changes in weather conditions. Pet.App.155a. NPDES permitting is incompatible with the flexibility these operations need because a general permit may only govern a particular water body, geographical area, or targeted pest. In response to a sudden outbreak or change in conditions, a mosquito control agency or farmer could be forced to seek coverage under a different general permit—if one existed—or could be forced to cease operations or risk sanctions if a general permit did not cover the new conditions.

Furthermore, the administrative burdens of even general permitting may be crippling. For instance, under a general permitting regime, a farmer applying for an irrigation system aquatic weed control permit may be required to comply with significant monitoring, public notice, recordkeeping and planning requirements. Cong. Amicus Br. 17-18. The costs of monitoring alone may be prohibitive for individuals and small entities. AMCA Amicus Br. 7. This will be particularly burdensome since the states will likely

have vastly different approaches and capabilities.[6] Moreover, even after general permitting is in place, pesticide applicators will face the constant threat of litigation under the CWA's citizen suit provision. Cong. Amicus Br. 18. That will create added burdens on mosquito control agencies, small businesses, and individual farmers and likely chill activity needed to promote agriculture and protect public health.

And the potential adverse public health consequences of such a regulatory regime cannot be overstated. Mosquito-borne diseases present in the United States—including St. Louis Encephalitis, Eastern Equine Encephalitis, Western Equine Encephalitis, Dengue Fever and West Nile Virus—are prevented only by effective mosquito control. AMCA Amicus Br. 3-4. If public health agencies are deterred from fully implementing their mosquito control programs by the administrative and financial burdens of permitting and the threat of litigation, Americans will face an increased risk of exposure to such diseases.

* * * * *

This Court has recently granted certiorari in environmental cases in which the government has similarly agreed with the petitioners that the lower court's decision was wrong but argued that the decision was not sufficiently important to warrant this Court's review. *See, e.g., Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458 (2009); *Entergy Corp. v. Riverkeepers, Inc.*, 129 S. Ct. 1498 (2009). By

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[6] Even where federal permits are issued, states may require additional conditions under 33 U.S.C. §1341.

any measure, the potential adverse impact of the decision below is exponentially greater than the potential adverse impact of the lower court decisions in those prior cases in which the Court granted certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

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AMERICAN FARM BUREAU FEDERATION, et al.,
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Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN MOSQUITO CONTROL ASSOCIATION, NATIONAL ASSOCIATION OF STATE DEPARTMENTS OF AGRICULTURE, LOUISIANA DEPARTMENT OF AGRICULTURE AND FORESTRY, MINNESOTA DEPARTMENT OF AGRICULTURE, NORTH CAROLINA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES, AND SOUTH DAKOTA DEPARTMENT OF AGRICULTURE IN SUPPORT OF THE PETITIONERS

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Eradication of Malaria in the United States (1947-1951), *available at* http://www.cdc.gov/malaria/history/index.htm#eradicationus 3

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INTEREST OF THE AMICI CURIAE[1]

The American Mosquito Control Association ("AMCA"), the National Association of State Departments of Agriculture ("NASDA"), and the Louisiana Department of Agriculture and Forestry, Minnesota Department of Agriculture, North Carolina Department of Agriculture and Consumer Services, and South Dakota Department of Agriculture respectfully submit this brief as amici curiae supporting the petitions for a writ of certiorari filed in Nos. 09-533 & 09-547.

AMCA is a not-for-profit corporation controlled by state and local governmental agencies responsible for mosquito control and is supported primarily by member dues.[2] AMCA members are vitally interested in whether the use of mosquito pesticides in lawful compliance with the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") simultaneously constitutes, as the Sixth Circuit held, the unlawful discharge into water of "pollutants" within the meaning of the Clean Water Act ("CWA").

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[1] Pursuant to Rule 37.2, the counsel for amici state that all parties received at least ten-days notice of amici's intent to file this brief, and that all parties have given their consent to file. Pursuant to Rule 37.6, counsel for amici curiae further state that no counsel for a party authored this brief in whole or in part, and no person other than amici or its counsel made a monetary contribution to this brief.

[2] Although private industry applicators and manufacturers of pesticides are among AMCA's members, private industry interests collectively have only one vote on AMCA's sixteen-member board of directors. Public mosquito control agencies have the other fifteen votes.

NASDA represents the commissioners, secretaries, and directors of the state departments of agriculture in all fifty states and four U.S. territories. As co-regulators with the U.S. Environmental Protection Agency ("EPA"), a majority of NASDA's members are the lead state agencies responsible for administering, implementing and enforcing the laws regulating the production, labeling, distribution, sale, use and disposal of pesticides in their states.

The Louisiana Department of Agriculture and Forestry, Minnesota Department of Agriculture, North Carolina Department of Agriculture and Consumer Services, and South Dakota Department of Agriculture are state agencies with primacy in pesticide matters under FIFRA in each state, respectively. Environmental safety is a prime requisite in the pesticide programs implemented by each department. The Sixth Circuit's decision is likely to disrupt longstanding state regulatory programs and relationships, as well as negatively impact the significant economic contributions from agricultural production in these states.

ARGUMENT

I. The Sixth Circuit's Invalidation of the EPA Rule Seriously Jeopardizes the Public Health

The petitioners provide numerous and well-founded reasons why this Court should grant the petitions for writ of certiorari, but amici write separately to emphasize the potentially grave public health consequences of the flawed Sixth Circuit decision. That decision is a clear and present danger to the public health because it exposes mosquito

control organizations to CWA liability that will impede their mission.

A. Mosquito control is critically important to public health in the United States. *See* EPA and U.S. Center for Disease Control and Prevention ("CDC"), Joint Statement on Mosquito Control in the United States, *available at* http://www.epa.gov/pesticides/health/mosquitoes/mosquitojoint.htm#programs ("Mosquito control activities are important to the public health . . . ."). Worldwide, mosquitoes cause more human suffering than any other organism—over one million people die from mosquito-borne diseases every year.[3] One such disease is malaria.[4] Although malaria was eradicated in the United States during the twentieth century through the use of pesticides, the CDC cautions that "the two species [of mosquito] that were responsible for transmission prior to eradication . . . are still widely prevalent; thus there is a constant risk that malaria could be reintroduced in the United States."[5] Currently, only malaria prevention techniques—including the spraying of insecticides that target mosquitoes—prevent malaria from reemerging in the United States.

Although the current threat of malaria in the United States has abated, the same is not true of other mosquito-borne diseases. Specifically, St.

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[3] Mosquito-Borne Diseases, American Mosquito Control Association, *available at* http://www.mosquito.org/mosquito-information/mosquito-borne.aspx.

[4] http://www.cdc.gov/malaria/.

[5] http://www.cdc.gov/malaria/facts.htm. *See also* Eradication of Malaria in the United States (1947-1951), *available at* http://www.cdc.gov/malaria/history/index.htm#eradicationus.

Louis Encephalitis,[6] Eastern Equine Encephalitis,[7] Western Equine Encephalitis,[8] Dengue Fever[9] and West Nile Virus[10] are all still present in the United States. There is no known vaccine or effective cure for any of these diseases; they are prevented *only* by controlling mosquito populations. In particular, West Nile Virus—which is responsible for the most severe outbreak of mosquito-borne disease in the United States in decades—continues to impact many parts of the country. In the last ten years, over 1,000 Americans have died, and over 10,000 were hospitalized, some with severe permanent disabilities, from this mosquito-borne disease.

B. In the absence of any official guidance on which pesticide applications near water would require National Pollutant Discharge Elimination System ("NPDES") permits under the CWA, and the absence of any guidance on what acceptable permits would encompass, the Sixth Circuit decision's invalidation of the EPA Rule exposes all mosquito control programs in the United States to the imminent threat of CWA suits. Indeed, since the Sixth Circuit issued its decision, twenty-one local mosquito control agencies in California alone have been served by environmental groups with intent to sue notices under the CWA for alleged CWA violations (*i.e.*, using pesticides without an NPDES permit). Such litigation would serve only to disrupt these agencies' critically important efforts to control

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[6] http://www.cdc.gov/ncidod/dvbid/arbor/sle_qa.htm.

[7] http://www.cdc.gov/ncidod/dvbid/arbor/eeefact.htm.

[8] http://www.cdc.gov/ncidod/dvbid/arbor/weefact.htm.

[9] http://www.cdc.gov/ncidod/dvbid/dengue/index.htm.

[10] http://www.cdc.gov/ncidod/dvbid/westnile/index.htm.

mosquitoes and mosquito-borne disease. Further, the cost of defending such litigation and the risk of fines and liability for plaintiffs' attorney fees will compel many of these agencies to abandon essential mosquito control activities or risk bankruptcy.[11]

If the Sixth Circuit decision is allowed to stand, the threat of CWA liability will seriously disrupt or effectively halt many essential mosquito control efforts throughout the United States. This could result in a marked increase in the number of deaths and serious illnesses caused by mosquito-borne diseases such as West Nile Virus.

II. The Sixth Circuit Decision Is Unworkable In Practice

Aside from seriously jeopardizing the public health, the Sixth Circuit decision creates an unworkable legal regime.

A. The Sixth Circuit notes that under its interpretation of the CWA, not all chemical pesticide applications require an NPDES permit. *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927, 936 (6th Cir. 2009). However, the two circumstances identified by the Sixth Circuit as needing a permit under the CWA—where traces of pesticides applied on land or in the air end up in water, or where residues of aquatic pesticides remain in the water, *see id.* at 936-37—effectively require an NPDES permit for all chemical pesticide applications, because operators can never be absolutely certain that traces of such pesticides will not enter water (in the case of

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[11] The temporary stay of the mandate obtained by the government does not obviate this problem because the mere existence of the Sixth Circuit decision has a present *in terrorem* effect on the ongoing activities of mosquito control entities.

pesticides applied on land and in the air), or remain in the water (in the case of pesticides applied directly in the water). In practice, the Sixth Circuit decision will effectively require that operators obtain an NPDES permit for every pesticide application, regardless of when and where the application is made. Because the CWA imposes criminal as well as civil liability, pesticide applicators face enormous risks if they operate without an NPDES permit.

B. Moreover, as discussed previously, mosquito control activities are highly dependant on pesticides. Accordingly, the significant increase in permit applications that would result from requiring an NPDES permit for every mosquito control application would paralyze the permitting process and leave public health officials with no effective mechanism to control pest outbreaks. This is particularly the case given that mosquito control districts must decide within a very brief time which areas to treat for mosquitoes (a planning process that typically must be completed in the span of a few hours, to at most one or two days, if it is to be effective and where such treatment can occur at literally thousands of specific locations).

C. In the more than thirty-five years of administering the CWA, the EPA has never issued an NPDES permit for the application of pesticides. By including pesticide applications under the CWA, the Sixth Circuit decision greatly expands the number of entities that will now need an NPDES permit. Currently, the NPDES program encompasses approximately 520,000 permitted facilities. Under EPA estimates, at a minimum, the Sixth Circuit decision will require an additional 365,000 so-called "applicators" to seek permits for

approximately 5.6 million pesticide applications per year. This represents a nearly two-fold increase in the volume of NPDES permits to be issued.

Even if the stay of the mandate provides the EPA with sufficient time to expand the NPDES permitting system to encompass all of the pesticide "applicators" swept in by the Sixth Circuit decision, the NPDES process is essentially incompatible with the realities of pesticide use for mosquito control. First, EPA regulations require that NPDES permits include monitoring programs. But the extremely large costs of routinely monitoring the constituents of pesticides before and after each application at even a small fraction of application sites would exceed the operational budgets of most mosquito control programs. Second, this type of monitoring would also require dissemination to the mosquito control programs of information on the complete composition of pesticide products—information which, as proprietary business information under FIFRA, cannot be legally provided by EPA or the states to these entities. *See* 7 U.S.C. 136h (d)(1)(C). In other words, a legal NPDES permit would create a condition for which compliance may be impossible—requiring the monitoring of chemical constituents by dischargers notwithstanding the fact that the dischargers cannot legally be provided the names of the chemicals to be monitored.

III. The Sixth Circuit Decision Burdens Farmers and States and Exposes Them to CWA Liability for Pesticide Applications Otherwise Lawful Under FIFRA

In addition to mosquito control agencies, the Sixth Circuit decision has broad (and jarring) consequences for farmers and states.

A. The Sixth Circuit decision requires NPDES permits for aquatic pesticide applications as well as for many terrestrial applications. As all pesticide applications are already regulated under FIFRA, requiring NPDES permits in these circumstances will impose a series of unnecessary, costly and burdensome requirements on farmers. Additionally, at present, neither EPA nor state regulators have the required resources to review the dramatic increase in permit applications that will result from the Sixth Circuit decision. Because of the time-sensitive nature of pesticide applications, the resulting delays will adversely impact the viability of farming operations across the country. Moreover, by impeding necessary pesticide uses to quickly combat emergency infestations, the Sixth Circuit decision could impair food production.

States will also be burdened by the new regime created by the Sixth Circuit decision. Just as the EPA will be designing NPDES permits to comply with the Sixth Circuit decision, forty-five states will be similarly required to develop their own permits to comply with that decision. Under FIFRA, it is the state lead agencies—generally the state departments of agriculture—that have primacy of the enforcement of pesticide matters. The consequence of the Sixth Circuit decision creates a tremendous unfunded regulatory mandate for the state governments. The decision will require states—not just EPA—to issue permits to cover pesticide applications that are already regulated and legal under FIFRA and state pesticide laws, laws that also enforce against the misuse of pesticide applications.

B. Further, by extending its decision to terrestrial applications—under the theory that pesticide applications on land or air may nevertheless have CWA implications if such pesticides end up in navigable waterways—the Sixth Circuit has placed every farmer in the United States in legal jeopardy under the CWA's citizen-action provisions for applications of pesticides that otherwise conform to FIFRA. If the Sixth Circuit decision is left to stand, U.S. farmers—regardless of farm size or produce output—will go into the next growing season under the looming threat of lawsuits. Similarly, states and local governments that apply pesticides along roadways and power lines, among other locations, face the burden of potential CWA litigation if residues of such terrestrial applications that otherwise conform to FIFRA end up in the nation's waterways.

CONCLUSION

For the foregoing reasons, amici request that this Court grant the petitions for a writ for certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

AMERICAN FARM BUREAU FEDERATION, *et al.*,
Petitioners,

v.

BAYKEEPER, *et al.*,
Respondents.

CROPLIFE AMERICA, *et al.*,
Petitioners,

v.

BAYKEEPER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AQUATIC ECOSYSTEM RESTORATION FOUNDATION, ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Cranberry Institute
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Louisiana Cotton and Grain Association
National Agricultural Aviation Association
National Alliance of Forest Owners
National Association of Home Builders
National Council of Farmer Cooperatives
National Corn Growers Association
National Potato Council
National Sorghum Group
North Carolina Cotton Producers
Oklahoma Cotton Council
Plains Cotton Growers
Rolling Plains Cotton Growers
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Southern Cotton Growers
Texas Cotton Producers
USA Rice Federation
Western Growers Association

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INTEREST OF *AMICI CURIAE*[1]

Amici are trade groups representing a broad range of agricultural, forestry, and development interests. *Amici*'s members use pesticides to prevent or remedy disease, infestation, and other harmful invasions of pests that would otherwise threaten food, water, forests, and other resources on which the public depends. Their application of pesticides is strictly regulated under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).

The Sixth Circuit's decision in this case rejected an Environmental Protection Agency (EPA) rule, which had provided that pesticide applications made in accordance with FIFRA do not constitute a discharge of a pollutant requiring a Clean Water Act (CWA) permit. CropLife Pet. App. 1a–25a.

This decision will affect hundreds of thousands of people and entities, including small businesses and individual landowners. EPA has stated that this decision threatens

> significant disruption among the hundreds of thousands of persons and businesses nationwide who apply pesticides to, over, or near waters of the United States without NPDES [National Pollutant Discharge Elimination System] per-

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[1] Pursuant to Rule 37.6, *amici* state that counsel for the parties did not author this brief in whole or in part, neither party nor party counsel made a contribution intended to fund the preparation or submission of the brief, and no person or entity other than an *amicus* made any monetary contribution to the preparation or submission of this brief. Counsel for all parties have received timely notice of intent to file this brief and have consented to the filing, and the letters of consent have been filed with the clerk.

> mits and now, as a result of this Court's decision, will need to obtain permits in order to continue doing so consistent with the Clean Water Act.

EPA Mot. for Stay at 1, CropLife Pet. App. 106a–107a. This will affect a wide variety of organizations that, like *amici*'s members, use pesticides to control dangerous pests, such as "local government entities that spray to and over waters to control mosquitoes, farmers who apply pesticides to eradicate aquatic pests, [and] foresters who aerially spray over waters to prevent outbreaks of timber pests." *Id.* at 1, 107a.

Thus, the panel's decision will burden *amici*'s operations by subjecting an array of activities to broad and uncertain CWA liability. Imposition of CWA permit requirements unsuited to those activities will impede *amici's* ability to respond quickly and effectively to harmful pests, risking significant losses and imposing crippling costs. *Amici's* operations are essential to our Nation's supply of food, water, and shelter, and they are vitally affected by this case. Accordingly, *amici* believe that the Court will benefit from their views in evaluating the importance of the legal question presented by petitioner.

BACKGROUND AND SUMMARY OF ARGUMENT

A central objective of the Clean Water Act is that "the discharge of pollutants into the navigable waters be eliminated by 1985." 33 U.S.C. § 1251(a)(1). In furtherance of this goal, the CWA forbids the unpermitted "discharge of any pollutant" from a point source. *Id.* § 1311(a). Accordingly, before anyone may lawfully discharge a pollutant, it is necessary to apply for and receive a permit under the "National

pollutant discharge *elimination* system," *id.* § 1342 (emphasis added).

The Sixth Circuit held that all biological pesticides and those chemical pesticides which result in "waste" in the water are pollutants under the statute and, when discharged to water from a point source, require an NPDES permit. The court held that the statute unambiguously precludes a contrary interpretation, and thus that there is no difference between farmers, landowners, and public health officials who treat crops, forests, and swamps to avoid dangerous infestations, and those who discharge industrial wastes into a river—under the Act, both types of discharges are to be eliminated. This result ignores common sense, does violence to the statute, and is contrary to this Court's direction in *Chevron* that deference is owed to the agency's interpretation of a statute it administers.

The provisions of the Clean Water Act relied on by the court of appeals do not mention pesticides. The only reference in the Act to pesticides is at 33 U.S.C. § 1254*(l)*, which authorizes EPA to "develop and issue to the States for the purpose of carrying out this chapter" studies on the effects of pesticides in water. Congress did not view pesticides categorically as harmful substances, requiring elimination. Just three days after passing the CWA, Congress enacted major revisions to the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), which *balances* the risks and benefits of applying pesticides. 7 U.S.C. § 136 *et seq.* FIFRA forbids any distribution of pesticides unless they are registered, *id.* § 136a(a), and ensures that they are not used in a way that "cause[s] unreasonable adverse effects on the environment." *Id.* § 136a(d)(1)(B). "Environment" is specifically defined to include "water." *Id.* § 136(j).

During the Clean Water Act debates, Senator Dole stated: "[p]esticides provide substantial *benefits* to mankind by protecting plants and animals from pest losses." S. Rep. No. 92-414, at 92 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3760 (emphasis added). He went on to note that pesticides would continue to be beneficial: "[t]he use of pesticides and other agricultural chemicals will undoubtedly retain a high level of importance in agriculture for the foreseeable future." *Id.* And he noted that they would be regulated under FIFRA: "In the meantime efforts at both State and Federal levels are paying off in securing the registration [pursuant to FIFRA] and adherence to recommended usages." *Id.*

Nonetheless, the Sixth Circuit held that pesticides were unambiguously "pollutants" within the meaning of the CWA's § 301, which forbids the unpermitted "discharge of any pollutant" from a point source. 33 U.S.C. § 1311(a). The Sixth Circuit suggested that it was compelled to reach this result because "pollutant" is defined by the CWA to include "chemical wastes" and "biological materials." *Id.* § 1362(6). But in its myopic focus on the list of words defining "pollutant," the court lost sight of the word itself: a pollutant is a substance "that renders the air, soil, water, or other natural resource harmful." *Random House Webster's Unabridged Dictionary* 1498 (2d ed. 2000). In doing so, it gave the term "pollutant" "no effect whatever." *Solid Waste Agency of N. Cook County* v. *Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) (*SWANCC*). Worse, the court prohibited EPA from giving any effect to the term "pollutant." EPA's view that the term "pollutant" cabined otherwise expansive terms such as "biological materials" was both reasonable and faithful to the statute. *Id.* That every fisherman's worm is

"biological material" does not make every cast of the rod without a CWA permit punishable by a $37,500 fine. 33 U.S.C. § 1319(b), (c); 40 C.F.R. § 19.4.

If left unaddressed, the Sixth Circuit's errors will have stark consequences. The NPDES permitting program currently encompasses approximately half a million permits; EPA has estimated that the decision below will expand the NPDES program to 5.6 million new pesticide applications *per year*. EPA Mot. for Stay at 11, CropLife Pet. App. 115a. And unlike most expansions of the NPDES program, which impose only economic burdens, this expansion threatens the ability of public health officials, forest owners, and farmers to prevent or remedy infestations that endanger the public welfare.

This case consolidated challenges from eleven circuits and settles the application of the Clean Water Act to pesticide discharges to the water. There will be no future split among the courts of appeals on the issue presented in this case. The Court should grant certiorari in this case to correct the dramatic misapplication of *Chevron* and to relieve the substantial burdens that this decision has placed upon farmers, landowners, and public health officials.

ARGUMENT

The Petition in this case effectively shows why this Court's review is warranted. Amici's purpose here is both to show that the implications of the decision below are sweeping and harmful and that those harms are not justified by any fair interpretation of the Clean Water Act. The Sixth Circuit ignored this Court's direction on the appropriate deference to an agency's interpretation of statutes which it administers, and this Court's decisions interpreting the Clean Water Act. Furthermore, this decision

leaves our Nation seriously vulnerable to destructive and dangerous infestations.

I. THE DECISION BELOW FAILS TO APPLY APPROPRIATE *CHEVRON* DEFERENCE.

a. It is axiomatic that the deference due an agency in interpreting a statute which it administers is governed by *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984). *Chevron* provides that a court must first determine if Congress has "addressed the precise question at issue," and, if not, defer to the agency interpretation so long as it is a "permissible construction of the statute." *Id.* at 843. This Court recently emphasized in a Clean Water Act case that the precise question at issue must be carefully formulated, and set out the question as the beginning of its analysis: "Do EPA performance standards and § 306(e), apply to discharges of fill material." *Coeur Alaska, Inc.* v. *Se. Alaska Conservation Council*, 129 S.Ct. 2458, 2469 (2009). When a court decides whether Congress has addressed the precise question, it should employ "traditional tools of statutory construction." *Chevron*, 467 U.S. at 843 n.9.

In this case, at the level of greatest precision, the question at issue is how, if at all, the permit provisions of the CWA apply to the discharge to the water of chemical and biological pesticides for the purpose of controlling pests in or over the water.

The Sixth Circuit failed to ask this question or any question close to it. In fact pesticides are not addressed in the provisions of the statute on which the Sixth Circuit relied. Indeed, the statute's only mention of "pesticides" comes at 33 U.S.C. § 1254(*l*), which directs EPA to "develop and issue to the States for the purpose of carrying out this chapter" studies on the kind and extent of effects on health and

welfare from pesticides in water. *Id.* § 1254(*l*)(1). This provision is clearly at odds with the conclusion that pesticides are to be addressed under the NPDES system. Under the Act it is the federal EPA, not the States, which has responsibility for establishing the terms on which permits are to be initially issued and then made more stringent over time. *Id.* § 1342(a). If Congress intended pesticides to be subject to NPDES permits, as industrial waste materials are, it would not have directed that the analysis of pesticides be issued to the States.

The pesticide study provision also authorizes the Administrator of EPA to "conduct studies and investigations of methods to control the release of pesticides into the environment" and "submit reports . . . with his recommendations for any necessary legislation." *Id.* § 1254(*l*)(2). If pesticides were already slated for elimination under the NPDES program, such a provision would not be necessary. The language of this provision is consistent with what the legislative history makes plain: pesticides are discharged to the water primarily for beneficial purposes and hence are fundamentally different from industrial waste.

Within days after passing the CWA, Congress enacted major revisions to FIFRA, which explicitly regulates pesticides, and authorized them to be used where they will not cause "unreasonable adverse effects on the environment." 7 U.S.C. § 136a(d)(1)(B). In other words, pesticides can and should be put to beneficial uses both on land and water but, as with all economic poisons, must be handled with care and judgment in order to prevent harm. In the context of addressing the Clean Water Act, Senator Dole made plain that, given the beneficial present and future uses of pesticides, they were to be regulated under

FIFRA: "[t]he use of pesticides and other agricultural chemicals will undoubtedly retain a high level of importance in agriculture for the foreseeable future. In the meantime efforts at both State and Federal levels are paying off in securing the registration [pursuant to FIFRA] and adherence to recommended usages." S. Rep. No. 92-414, at 92, *as reprinted in* 1972 U.S.C.C.A.N. at 3760.

Congress did not explicitly address the precise question at issue and identify pesticides discharged to the water as "pollutants" subject to permitting. Moreover, the Sixth Circuit's decision is inconsistent not only with the one section of the Clean Water Act explicitly directed to the regulation of pesticides, but also with the understanding of Congress that contemporaneously enacted FIFRA to address pesticide issues directly. In fact, the evidence in the statute and its legislative history clearly show that Congress did not consider pesticides to be classed as "pollutants."

The Sixth Circuit's analysis flies in the face of this Court's *in pari materia* canon, which dictates that statutes addressing the same subject matter generally should be read "'as if they were one law.'" *Erlenbaugh* v. *United States*, 409 U.S. 239, 243 (1972). The Sixth Circuit refused to consider the bearing of FIFRA on the question before it, declining to "analyze the relationship between the Clean Water Act and the FIFRA." CropLife Pet. App. 25a. Had it done so, it would have found that Congress recognized that a balance had to be struck between the benefits gained from careful use of pesticides on land and water and the risks of indiscriminate use of economic poisons. FIFRA sets out how that balance is to be struck; the Clean Water Act does not.

b. At the next level of generality, the question at issue may be phrased as whether a substance whose discharge to the water presents both benefits to human health and the environment, and certain risks, falls within the definition of "pollutant" under 33 U.S.C. § 1362(6). On this question, the Sixth Circuit reached an answer that is not found in the text of statute, and defies common sense. Nevertheless, the court found its reading to be supported unambiguously by the statute.

The decision below asserts that "[t]he term 'biological materials' cannot be read to exclude biological pesticides or their residuals." CropLife Pet. App. 19a. Presumably, the Court meant that "biological pesticides" are literally "biological materials." This, of course, is true. But by focusing only on the words in the definition of pollutant, 33 U.S.C. § 1362(6), and not on the term "pollutant" itself, the court below failed to follow this Court's instruction that the meaning of the defined term itself must be given some effect. *SWANCC*, 531 U.S. at 172; *Rapanos* v. *United States*, 547 U.S. 715, 734 (plurality opinion), 779 (Kennedy, J., concurring) (2006). This Court's instruction in *SWANCC* and *Rapanos* is particularly germane in this case. The Seventh Circuit, reversed by this Court in *SWANCC*, made the same error with respect to the provision of the Clean Water Act which defines "navigable waters," 33 U.S.C. § 1362(7), failing to give any weight to the term "navigable." The court below, however, has committed an error with more profound consequences. The *SWANCC* court merely gave deference to the Army Corps' decision to give no effect to the defined term; the court here has affirmatively prohibited EPA from giving any effect to the term

"pollutant," despite the deference that EPA is owed in this context.

The *Random House Webster's Unabridged Dictionary*, *supra*, at 1498, offers two definitions of pollutant: "1. something that pollutes.[2] 2. any substance . . . that renders the air, soil, water, or other natural resource harmful or unsuitable for a specific purpose." Both definitions connote a substance that is harmful or deleterious. Thus, to give the term "pollutant" effect, EPA properly provided that a pesticide is only a pollutant if it is not used according to the terms prescribed by FIFRA.

EPA's interpretation makes far more sense of the definition of pollutant. While some of the substances listed in 33 U.S.C. § 1362(6) are generally considered harmful, others would be harmful or beneficial depending on the circumstances. This is clearly the case with heat and biological materials. Thermal discharges are specifically recognized in the statute as being either beneficial or deleterious depending upon the circumstances. The statute authorizes EPA to conduct comprehensive studies regarding "minimizing adverse effects and maximizing beneficial effects of thermal discharges." 33 U.S.C. § 1254(t).

What is true for heat is true for biological materials as well. Many biological materials are plainly pollutants, and many are not. Congress surely did not intend, for instance, to require discharge permits for the introduction of hatchery-raised fish to navigable waters or to eliminate the introduction of such fish by 1985. In fact, other statutes promote the stocking of hatchery-raised fish for sport and

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[2] *Random House Webster's Unabridged Dictionary*'s first definition of "pollute," *supra*, at 1498, is "to make foul or unclean, esp. with harmful chemical or waste products."

recreation. 16 U.S.C. § 760 *et seq.* And, the CWA itself contains a provision directing the U.S. Fish and Wildlife Service, in cooperation with state agencies, to establish and implement a fisheries resource program for Lake Champlain, "including dedicating a level of hatchery production . . . at or above the level that existed immediately preceding the date of enactment." 33 U.S.C. § 1270 note. The most prominent example of the Act's focus on the elimination of substances *when they are harmful* is the national policy that the discharge of "toxic pollutants *in toxic amounts*" be prohibited. *Id.* § 1251(a)(3) (emphasis added). Congress clearly recognized that even "toxics" are truly pollutants only when they cause harm.

The answer to the question of how Congress addressed whether or not substances that may be beneficial or harmful, depending upon the circumstances, are to be classified makes perfect sense. When the substance is harmful, it is a pollutant; when it is beneficial, it is not. As we have shown, it is in FIFRA and not the Clean Water Act that Congress struck the balance that permits the beneficial use of pesticides but prohibits their harmful use.[3]

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[3] The primacy of FIFRA in governing the use of pesticides is reinforced by the terms of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.*, which Congress passed in 1980 and which governs the reporting and clean up of discharges of hazardous substances into the environment. Under CERCLA, Congress explicitly treated pesticides in a manner unlike any other hazardous substance. The statute requires reporting of "any release (other than a federally permitted release)" of a hazardous substance. *Id.* § 9603(a). But the section does not apply to the application of a pesticide product registered under FIFRA. *Id.* § 9603(e). The statute also imposes liability for

If the Sixth Circuit had framed the question at issue carefully, it would have found that, although the statute does not explicitly address whether pesticides are pollutants, it does recognize that "pollutants" are limited to harmful or deleterious substances.

Under *Chevron*, EPA's interpretation of the statutory scheme was both reasonable and fully consistent with the direction provided in the Clean Water Act, FIFRA, and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The discharge of pesticides into the water for the beneficial purposes of preventing or remediating an infestation is not the discharge of a pollutant when it is done pursuant to FIFRA, the statute that directs EPA to set the parameters for the use of pesticides. The agency's interpretation was entitled to deference.

II. THE DECISION BELOW THREATENS THE NATION'S ABILITY TO PREVENT INFESTATIONS THAT ENDANGER THE PUBLIC WELFARE.

At a stroke, the Sixth Circuit's decision has made all pesticide applications to the waters of the United States illegal. Petitioners and their members rely on

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remedial costs resulting from the release of a hazardous substance. *Id.* § 9607(a). But it provides no recovery of such costs resulting from the application of a pesticide product registered under FIFRA. *Id.* § 9607(i). By dealing with pesticides under a provision that is separate from that addressed to "federally permitted releases," Congress made clear that pesticides were not regulated by permit programs such as that in the CWA but instead are regulated by the terms of FIFRA. This statutory exception to CERCLA is fully consistent with the treatment afforded pesticides in the EPA rule vacated by the Sixth Circuit in this case.

these applications to safeguard the nation's crops, forests, and housing stock from dangerous infestations. The Sixth Circuit's decision will put these vital resources in grave danger.

As EPA has stated, the decision will forbid "5.6 million pesticide applications annually . . . to control pests such as mosquitoes and gypsy moths, combat algae, weeds and other undesirable vegetation and attack invasive species such as zebra mussels." EPA Mot. for Stay at 11, CropLife Pet. App. 115a. The decision will prevent action by "local government entities that spray to and over waters to control mosquitoes, farmers who apply pesticides to eradicate aquatic pests, [and] foresters who aerially spray over waters to prevent outbreaks of timber pests." *Id.* at 1, 107a. The decision will make each such application of pesticide unlawful. *Id.* at 1–2, 106a–107a.

EPA has suggested that these dramatic adverse consequences may be mitigated by the development of general permits for application of pesticide to water, but such claims may be wishful thinking and at a minimum warrant healthy skepticism.

First, as EPA details, the process of developing and implementing a general permit is complicated, time-consuming, and unpredictable. EPA Mot. for Stay at 11–15, CropLife Pet. App. 115a–119a. This is by design—in implementing its statutory duty, EPA must seek and respond to input from States, other federal agencies, and the public at large. Both the process and the results may not afford pesticide applicators the certainty that they need. More fundamentally, it is unclear how EPA can possibly reconcile Congress's objective to eventually eliminate pollutants with the necessity of generally permitting pesticide application.

Second, under the Sixth Circuit's decision, EPA simply does not have the authority to authorize pesticide application in the vast majority of the country. As EPA acknowledges, a general permit "will provide permit coverage only in the four States in which EPA is the permitting authority, plus the United States' territories, tribal lands and federal facilities." EPA Mot. for Stay at 14–15, CropLife Pet. App. 118a. Thus, there is no easy fix for the problem created by the decision below. Even States that wish to follow suit may face additional procedural hurdles. And there is no certainty that States always have the appropriate incentives to address the pesticide application problem—pesticides prevent *national* outbreaks of disease and crop infestation that transcend state boundaries, which is why they are regulated nationally under FIFRA.

Finally, general permits do not account for the full flexibility that pesticide applicators require to combat infestations that suddenly threaten crops due to unanticipated confluences of aggravating factors. Take the example of aerial application businesses. Although there are approximately 1,600 such businesses in the United States, the average number of aircraft per business is only 2.2, and each such business typically has between three and five employees. These aerial applicators are often asked to make an application for mosquito abatement or for a crop just minutes before the application is needed—making it impossible to file CWA paperwork, including a notice of intent, in advance. And under general permits, the applicator could be required to do follow-up water monitoring to make sure the application had no negative effects. This requirement would force aerial applicators to trespass on private property, to which they have no legitimate access. In

contrast, such applicators are trained to handle pesticides in compliance with FIFRA, which strictly regulates such applications but does not require anticipating applications well in advance of their necessity and does not require follow up visits.

This simple example illustrates vividly the immediate and acute nature of the harms caused by the Sixth Circuit's decision. Similar examples abound. Thus, cranberry growers whose crop grows in the waters of the United States obviously will be directly harmed by this new regulatory regime that Congress never enacted. The bottom line point is straightforward, many livelihoods that are represented by the associations participating as *amici* in this case are now in serious jeopardy and only review by this Court can protect them.

In sum, the decision below threatens pesticide applicators with unpredictable and potentially fatal harm, and thus places our nation's forest, housing, and agricultural resources in danger.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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IN THE
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CROPLIFE AMERICA, ET AL., PETITIONERS

v.

BAYKEEPER, ET AL.

AMERICAN FARM BUREAU
FEDERATION, ET AL., PETITIONERS

v.

BAYKEEPER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Sixth Circuit erred in concluding that the "plain language" of the Clean Water Act unambiguously prohibits an Environmental Protection Agency ("EPA") rule that, consistent with more than 35 years of agency practice, provides that the application of a federally approved pesticide to or over water for its intended purpose and in accordance with the requirements of the EPA's pesticide regulatory program is not a "discharge of a pollutant."

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IN THE

Supreme Court of the United States

No. 09-533

CROPLIFE AMERICA, ET AL., PETITIONERS

v.

BAYKEEPER, ET AL.

No. 09-547

AMERICAN FARM BUREAU FEDERATION, ET AL., PETITIONERS

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* SUPPORTING PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

Amici are a bipartisan group of Members of Congress with a strong interest in the implementation

[1] Pursuant to Rule 37.6, no counsel for any party authored this brief, in whole or part, and no counsel for a party or party made a monetary contribution to fund the preparation or submission of this brief. No entity or person, aside from the *amici curiae* and their counsel, made any monetary contribution for the preparation or submission of this brief. Counsel of record for the parties received timely notice of the intent to file this brief, and their letters consenting to the filing of this brief have been filed with the Clerk.

and interpretation of the Clean Water Act ("CWA") and the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). Senator James M. Inhofe is the Ranking Member, and Senators Christopher S. Bond and David Vitter are members, of the Senate Committee on Environment and Public Works. Representative John L. Mica is the Ranking Member, and Representative Howard Coble is a member, of the House Committee on Transportation and Infrastructure. Representative John Boozman is the Ranking Member on the Water Resources and Environment Subcommittee of the House Committee on Transportation and Infrastructure. These committees (and subcommittee) have jurisdiction over water pollution and other issues related to the CWA. Senators Mike Johanns and E. Benjamin Nelson are members of the Senate Committee on Agriculture, Nutrition and Forestry, which has jurisdiction over issues relating to FIFRA. Representative Frank D. Lucas is Ranking Member, and Representatives Dennis A. Cardoza, Travis W. Childers, K. Michael Conaway, Lincoln Davis, Larry Kissell, Blaine Luetkemeyer, Cynthia M. Lummis, Eric J.J. Massa, Mike McIntyre, Randy Neugebauer, David P. Roe, and Kurt Schrader are members, of the House Committee on Agriculture, which has jurisdiction over issues relating to FIFRA. Representatives Leonard L. Boswell, Sam Graves, and Betsy Markey are members of both the House Transportation and Infrastructure and Agriculture Committees. Representatives Marion Berry, F. Allen Boyd, Jr., Lincoln Davis, Jo Ann Emerson, Jack Kingston, and John T. Salazar are members of the House Committee on Appropriations, which has jurisdiction over matters relating to revenue and expenditures of all federal programs, including those under the CWA and FIFRA. Representatives Roy

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* Senators Blanche Lincoln and Saxby Chambliss, the Chairman and Ranking Member of the Senate Committee on Agriculture, Nutrition, and Forestry, also join this brief.

Blunt, Jeff Flake, Wally Herger, Lynn Jenkins, Walter B. Jones, Jr., Doug Lamborn, Sue Myrick, and Mike Ross represent districts with strong interests in agriculture, pesticide use, and pest control.

The Sixth Circuit's decision implicates important concerns involving environmental protection, public health, and economic growth. *Amici* have a strong interest in preserving the traditional understanding of the relationship between the CWA and FIFRA, which appropriately balances these objectives, and which was embodied in the Environmental Protection Agency ("EPA") rule invalidated by the Sixth Circuit. *Amici* also have an interest in preserving the role Congress originally created for the EPA under the CWA, which would allow the agency to bring its expertise to bear in interpreting and implementing its ambiguous terms. Finally, *amici* have a strong interest in protecting their constituents who apply pesticides in accordance with FIFRA from unreasonable legal liability, and in protecting their constituents from the many harms threatened by the Sixth Circuit's unreasonable restrictions on pesticide use.

REASONS FOR GRANTING THE PETITIONS

Since the CWA's enactment in 1972, the EPA has never required a National Pollutant Discharge Elimination System ("NPDES") permit for the application of FIFRA-registered pesticides to or over the waters of the United States. After notice and two rounds of public comment, the EPA formally promulgated a rule (the "EPA Rule"), 71 Fed. Reg. 68,483 (Nov. 27, 2006) (reproduced at Pet. App. 68a-111a[2]), that "codified what had been EPA's practice during the more than 35 years EPA has administered the

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[2] References to "Pet. App." are to the petitioners' appendix in *American Farm Bureau Federation v. Baykeeper*, No. 09-547.

Clean Water Act," EPA Mot. for Stay of Mandate at 9 (reproduced at Pet. App. 122a). For the reasons set forth below, the Sixth Circuit's holding that the CWA *unequivocally prohibits* the EPA Rule—and, by implication, that it *unequivocally mandates* treating FIFRA-registered pesticides used for their approved purpose as "waste," even when applied under conditions that EPA has found to be consistent with preventing "unreasonable adverse effects on the environment," 7 U.S.C. § 136a(c)(5)(C)—urgently warrants review.

A. The Sixth Circuit Has Substituted Its Deeply Flawed Reading Of The Clean Water Act For That Of The Expert Agency

Amici would not be filing this brief if this were a close case. This is not an instance where the court of appeals carefully analyzed an administrative rule under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and mistakenly, but reasonably, concluded that the rule was not entitled to deference. Indeed, the Sixth Circuit's reading is sufficiently unreasonable that it can be understood only as that court substituting its judgment for that of the expert agency charged with implementation of the statute, contrary to the clear intent of Congress.

1. *Meaning of "Chemical Waste."* The Sixth Circuit held that the CWA's term "chemical waste," 33 U.S.C. § 1362(6), unambiguously includes FIFRA-approved chemical pesticides that leave some residue after serving their "beneficial purpose," Pet. App. 19a, even where applied to control pests consistent with labeling EPA has found sufficient to prevent environmental harm, and even where the applicator is unaware of (and does not intend to dispose of) any residue. The court acknowledged that the term

"chemical waste" ordinarily means "discarded," "superfluous," or "refuse or excess" chemicals. *Id.* at 17a-18a. The court nonetheless concluded that although such pesticides are not "discarded" or "refuse" at the time of application, they are "waste" if residue remains after the pesticide has served its purpose. *Id.* Because "virtually all applications of chemical pesticides leave * * * residu[e]," under the Sixth Circuit's holding, "almost all applications of chemical pesticides to, over, or near waters will now require NPDES permits." Pet. App. 121a.

The conclusion that a beneficial product, which EPA itself carefully regulates under a detailed regime that explicitly considers effects on water quality and the environment, *see* 7 U.S.C. § 136a(c)(5), is "waste" *at the time it is used for its intended purpose*, is facially suspect. As the Second Circuit concluded, "pesticides are not being discarded when sprayed * * * with the design of effecting their intended purpose." *No Spray Coalition v. City of New York*, 252 F.3d 148, 150 (2d Cir. 2001) (per curiam). And, nearly four months *after* the Sixth Circuit's decision in this case, this Court concluded in *Burlington Northern & Santa Fe Ry. v. United States*, 129 S. Ct. 1870, 1880 (2009), that a company was not liable under the Comprehensive Environmental Response, Compensation, and Liability Act for "arrang[ing] the disposal" of a hazardous substance because it did not intend to "dispose" of the pesticide at the time some spilled during commercial distribution.

To reach its patently mistaken conclusion, the Sixth Circuit disregarded several bedrock principles of statutory construction.

a. First, the court plainly disregarded its obligation to consider the definition of "pollutant" in the context of the regulatory scheme. "In making the threshold determination under *Chevron*" whether a statute is ambiguous, "'a reviewing court should not confine itself to examining a particular statutory provision in isolation,'" but rather must interpret the provisions "'in context.'" *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)). Although the court gave lip service to the notion that the meaning of language must be determined in the context of the statute as a whole, Pet. App. 16a, it considered the words "chemical waste" in isolation. *See id.* at 17a-20a.

The court failed to consider what section 104(*l*) of the CWA, the sole provision that specifically refers to the effects of pesticides on water quality, indicates about whether using approved pesticides to control pests constitutes the sort of pollutant discharge that the CWA's National Pollutant Discharge Elimination System seeks to "eliminate." That provision does not classify pesticides as "pollutants"; rather, it requires studying "methods to control the release of pesticides into the environment [including] examination of the persistency of pesticides in the water environment," and calls for the President to report the results of that study to Congress together with "recommendations for any necessary legislation." 33 U.S.C. § 1254(*l*). That language does not suggest an intent to *eliminate* the application of pesticides to water. Indeed, the Act's legislative history indicates that "[t]he use of pesticides * * * will undoubtedly retain a high level of importance in agriculture for the foreseeable future" because "[p]esticides provide substan-

tial benefits to mankind by protecting plants and animals from pest losses." S. Rep. No. 92-414, at 92 (1971) (supplemental views of Sen. Dole), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3760. The legislative history suggests that residue from pesticides is to be addressed not through the NPDES system, but through the regulation of *nonpoint* sources. *See, e.g.*, H.R. Rep. No. 92-911, at 1275 (1972); *id.* at 1293-94 (stating that "[a]gricutural pollution control" concerns, among other things, "[p]esticides, fungicides, and herbicides," and that "[m]ost of the problems of agricultural pollution deal with * * * nonpoint sources"; noting that efforts under FIFRA "are paying off in securing registration and adherence to recommended usages"); *id.* at 1298.

b. Moreover, the Sixth Circuit failed to consider the meaning of "pollutant" and "chemical waste" in light of other federal regulatory efforts, particularly the system Congress specifically established decades before the CWA to regulate pesticide use, FIFRA. *See* Pub. L. No. 80-104, ch. 125, 61 Stat. 163 (1947). "When 'interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) * * * .'" *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (quoting *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1856)). It is important to consider a provision in light of the entire regulatory structure, because "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." *Brown & Williamson*, 529 U.S. at 133. Although the Sixth Circuit noted the FIFRA regulatory scheme in passing at the beginning of its opinion, *see* Pet. App.

5a, it failed to consider its parallel regulatory scheme as relevant context in interpreting the CWA. That was error.

At the time that Congress took up the legislation that became the CWA, FIFRA required the registration of all pesticides that moved in interstate commerce and required all registered pesticides to bear a warning label bearing directions "adequate to prevent injury to living man and other vertebrate animals, vegetation, and useful invertebrate animals." 7 U.S.C. §§ 135(z)(2)(d) (1970), 135a(a)(5) (1970); *see also id.* § 135(z)(2)(g) (1970). As relevant here, FIFRA provided that the EPA Administrator would register a pesticide if "its labeling and other material required to be submitted" were sufficient, *id.* § 135b(b) (1970), to "prevent injury to * * * vertebrate animals * * * and useful invertebrate animals." *Id.* § 135(z)(2)(d).

Three days after enacting the CWA, Congress enacted comprehensive revisions to FIFRA. As amended, FIFRA continues to require that any pesticide sold in the United States must first be registered with the EPA. *See* 7 U.S.C. §§ 136 *et seq.* EPA may approve a pesticide only after it has made a detailed empirical assessment of its potential adverse environmental impacts, including specifically those "on aquatic resources (*e.g.*, fish, invertebrates, plants, and other species in fresh water, estuarine, and marine environments)," Pet. App. 93a, and the agency has imposed any restrictions on its use that are necessary to prevent "unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c). The statute does not require users to seek government authorization before applying a registered pesticide. Rather, necessary restrictions are reproduced on the pesticide

label, and users must comply with those restrictions in applying the pesticide or risk liability. *See* 7 U.S.C. § 136j(a)(2)(G).

It seems extraordinarily unlikely that Congress intended, through the CWA's use of the general term "chemical waste," to sweep into the NPDES program the application of pesticides that were already subject to comprehensive regulation under legislation specifically governing pesticide use, even when applied subject to restrictions that EPA had found sufficient to prevent "unreasonable adverse effects on the environment." At a minimum, one would expect Congress to speak clearly before subjecting such conduct to an additional layer of regulation. "Congress * * * does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001); *cf. Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153-54 (1976) (absent "clear intention otherwise," "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum").

In this regard, the Sixth Circuit's conclusion conflicts with this Court's decision in *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976), which involved a neighboring term in the very same definition of "pollutant" at issue here. *See* 33 U.S.C. § 1362(6) (Supp. IV 1975). There, the court of appeals had held that the general term "radioactive materials" was "plain and unambiguous" in its sweep, and unequivocally encompassed "*all* radioactive materials," including source, byproduct, and special nuclear materials that had long been regulated under the Atomic Energy Act. Thus, it held that those nuclear materials were "pollutants" under the Federal

Water Pollution Control Act ("FWPCA"), as the CWA was then known. This Court reversed, holding that it was "abundantly clear" that Congress had not "intended the Act to encompass" those materials, reasoning that "[t]o have included these materials under the [Act] would have marked a significant alteration of the pervasive regulatory scheme embodied in the [Atomic Energy Act]." 426 U.S. at 23-24. Absent a "clear indication of legislative intent," the Court would not read the FWPCA's general language to have "significant[ly] alter[ed]" the regulatory landscape. *Id.* at 24. *Train* compels the conclusion that Congress did not, through the CWA's use of the general term "chemical waste," intend to substantially alter the regulatory regime by requiring users to obtain an NPDES permit before applying federally registered pesticides to or over water in accordance with their labels.

2. *Meaning of "Biological Materials."* The Sixth Circuit likewise erred in concluding that "'biological materials' cannot be read to exclude biological pesticides or their residuals," Pet. App. 21a, thus subjecting all biological pesticides to NPDES permitting, regardless of whether they leave residue after their use is complete. *Id.* at 121a. Under *Train*, the use of the general term "biological materials" is insufficient to indicate that Congress intended to sweep within the NPDES program pesticides that were already subject to exacting environmental regulation under FIFRA. *See* pp. 9-10, *supra*. It is evident from the face of the statute that the term is not meant to include "biological materials" of whatever kind, a reading that, as the EPA noted, "could arguably mean that activities such as fishing with bait would constitute the addition of a pollutant." Interim Statement and Guidance

on Application of Pesticides to Waters of the United States in Compliance with FIFRA, 68 Fed. Reg. 48,385, 48,388 (Aug. 13, 2003). The Ninth Circuit thus has concluded that the "the statute is ambiguous on whether 'biological materials' means *all* biological matter * * * or whether the term is limited to biological materials that are a waste product of some human process." *Ass'n to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1016 (9th Cir. 2002).

While the term "materials" in the abstract is broader than "wastes," it is "unlikely that Congress intended to include biological pesticides * * * [as] pollutants, while chemical pesticides used in the same circumstances" would not be. Pet. App. 83a. The different language simply reflects the fact that biological pesticides were uncommon in 1972 and thus were not the focus of the definition. As EPA noted in promulgating the Rule, "[s]ince biologically and chemically based pesticides * * * are both EPA-evaluated products, treating them differently under the Clean Water Act is not warranted." *Id.* Moreover, because "biological pesticides in use today are generally reduced-risk products, * * * it would not make sense, and would be inconsistent with the goals of the Clean Water Act, to discourage the[ir] use * * *." *Id.*

3. The Sixth Circuit also failed to consider the expert agency's longstanding practice in determining the meaning of the words "chemical waste" or "biological materials." The very first words in the EPA's brief before the Sixth Circuit set forth the agency's long-held position:

> Since the enactment of the Clean Water Act in 1972, EPA has not required persons applying

> pesticides directly to or over waters of the United States for the purpose of controlling pests in or over those waters to obtain a Clean Water Act [NPDES] permit. This position reflected a general understanding that Congress did not intend to regulate under the Clean Water Act properly applied pesticides to control pests in or over waters when those pesticides had been approved by EPA for such use under [FIFRA] regulations.

EPA Br. at 3, *National Cotton Council of Am. v. EPA*, No. 06-4630; *accord* Pet. App. 73a (EPA Rule). Although the agency clearly apprised the Sixth Circuit of its contemporaneous and longstanding interpretation, the court did not so much as mention it in reaching its conclusion.[3]

An agency's contemporaneous and consistently maintained interpretation of a statute is "[o]f particular relevance" in construing its meaning, "which 'we have allowed . . . to carry the day against doubts that might exist from a reading of the bare words of a statute.'" *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 414 (1993) (quoting *FHA v. Darlington,*

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[3] The court *did* note an agency statement that pesticides could not be "'discharge[d] into lakes, streams, ponds, or public waters unless in accordance with an NPDES permit.'" Pet. App. 6a (quoting EPA, Policy and Criteria Notice 2180.1 (1977)). That policy statement, however, involves *waste effluent* discharges that may contain a pesticide, not the application of pesticides to control pests. *See generally* EPA, Office of Prevention, Pesticides, and Toxic Substances, Pesticide Regulation Notice 93-10 re: Effluent Discharge Labeling Statements (July 29, 1993), *available at* http://www.epa.gov/PR_Notices/pr93-10.pdf. The quoted policy statement is consistent with the EPA Rule, which itself noted that a "pesticide may become a 'pollutant' at a later time (*e.g.*, after the pesticide product has served its intended purpose)." Pet. App. 87a.

Inc., 358 U.S. 84, 90 (1958)). Particularly where, as here, the agency was involved in developing the legislation in question, such a construction represents the considered view of those in the agency whom Congress "'charged with responsibility of setting its machinery in motion.'" *Aluminum Co. of Am. v. Cent. Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 390 (1984) (quoting *Udall v. Tallman*, 380 U.S. 1, 16 (1965)). "While not conclusive, it surely tends to show that the EPA's current practice is a reasonable and hence legitimate exercise of its discretion * * * that the agency has been proceeding in essentially this fashion for over 30 years." *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1509 (2009).

Moreover, it is significant that Congress has not seen fit to modify the statute during the intervening 37 years. "Congress is presumed to be aware of an administrative * * * interpretation of a statute," and "when it reenacts a statute without change," it is an indication that the agency has correctly determined Congress's intent. *Lindahl v. OPM*, 470 U.S. 768, 782 n.15 (1985). Since 1972, Congress has twice made major amendments to the NPDES program,[4] and on other occasions it has made minor changes to it.[5] But at no time has Congress seen fit to amend the statute to require EPA to control the application of pesticides through the NPDES program. Under

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[4] *See* Clean Water Act of 1977, Pub. L. No. 95-217, §§ 33(c), 54(c)(1), 65, 66, 91 Stat. 1566, 1577, 1591, 1599, 1600; Water Quality Act of 1987, Pub. L. No. 100-4, tit. IV, §§ 401-04(a), (c), (d), 405, 101 Stat. 7, 65-69.

[5] *See* Water Resource Development Act of 1992, Pub. L. No. 102-580, tit. III, § 364, 106 Stat. 4797, 4862; Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 1(a)(4), App. D, Div. B, tit. I, § 112, 114 Stat. 2763, 2763A-224 (2000).

this Court's precedents, that is a compelling indication that EPA has correctly interpreted Congress's intent. *See United States v. Rutherford*, 442 U.S. 544, 553-54 (1979) (holding that Congress's failure to overrule the FDA's decision not to make an exception for drug licensing for drugs used by the terminally ill reflects Congress's ratification of that position). "In the [37] years during which" the EPA has taken this consistent interpretation, "Congress has never expressed its disapproval, and its silence in this regard suggests its consent to the [EPA's] practice." *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981).

4. The most natural reading of the CWA, in light of all traditional tools of statutory construction, is the one embodied by the EPA Rule: the Clean Water Act's NPDES permit requirement does not encompass the application of FIFRA-registered pesticides to or over water in accordance with labeling restrictions. But at a minimum, it cannot be said that the opposite conclusion is *compelled* by the text of the statute.

B. The Sixth Circuit's Decision Will Have Grave Practical Consequences

1. Review is also warranted because of the breathtaking practical consequences the Sixth Circuit's decision will have. The EPA's analysis suggests that the Sixth Circuit's judgment likely will result in the *single greatest expansion* in the history of the NPDES program, resulting in approximately 5.6 million covered pesticide applications per year by 365,000 applicators. Pet. App. 124a. That figure is vastly greater than the current number of facilities authorized to discharge under individual permits (45,700), the number of facilities authorized for non-storm water

discharges under general permits (120,000), the number of industrial storm-water point sources (96,500), and even the number of storm water point sources associated with construction (250,000). Pet. App. 141a-142a. The current number of NPDES permittees is 411,470 facilities. *Id.* at 142a. Thus, in a single stroke, the Sixth Circuit's decision virtually *doubles* the number of entities subject to NPDES permitting.

It provides little comfort that the EPA "*believes it* can conform *its* conduct to comply with the [Sixth Circuit's] decision." EPA Response to Petition for Rehearing En Banc 2 (filed June 3, 2009) (emphasis added). Even assuming that the EPA's predictions about its ability to create a general permitting scheme are borne out, the EPA's compliance represents just a small fraction of the total cost of the Sixth Circuit's exorbitant mandate. *Forty-five* states, many of them already under severe budgetary pressure, face the daunting administrative task of developing and issuing general permits to implement the Sixth Circuit's decision.

2. The Sixth Circuit's decision also imposes tremendous burdens on pesticide users. It will increase by orders of magnitude the difficulty and cost for pesticide applicators to comply with the law. For small applicators, many of whom can ill afford expert environmental counsel, efforts at compliance will go from a simple matter of following instructions on a pesticide label to the vastly more complex process of identifying the relevant general permit, filing with the regulatory authority a valid notice of intent to comply with the general permit, *see* 40 C.F.R. § 122.28(b)(2)(i) (2008), and complying with all the permit's conditions and restrictions.

Completing a notice of intent alone can be complicated and time-consuming. While we understand that EPA has not yet finalized the requirements of general permits governing aquatic pesticide application, the following excerpts of general permit applications illustrate the often exacting requirements of notices of intent:

For the discharge described * * *, please provide concentrations of the following parameters ["Total Suspended Solids," "Oil and Grease," "pH (give high and low in range)," and "Surfactants"] and indicate whether the data is based on actual sampling results or, if estimated, a source of the estimated value. Data must be representative of the facility's current operation. The average daily value is typically based on an average of the last 365 days of data.[6]

- [Provide] [a] stormwater management program (SWMP), including best management practices (BMPs) that will be implemented and the measurable goals for each of the stormwater minimum control measures specified in Part V, Section B. [of this application], [and] the month and year in which the applicant will start and fully implement each of the minimum control measures or the frequency of the action * * *.[7]

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[6] S.C. Dep't of Health and Envtl. Control, Notice of Intent NPDES General Permit for Vehicle Wash Water Discharges SCG750000 at 2 (2002), *available at* http://www.scdhec.gov/administration/library/D-3756.pdf.

[7] Water Quality Div., Ariz. Dep't of Envtl. Quality, Arizona Pollutant Discharge Elimination System, General Permit for Discharge from Small Municipal Separate Storm Sewer Systems to Waters of the United States at 8 (2002), *available at*

- Provide an estimated start date the discharge did or is to commence, the name(s) of the receiving water(s), and check compliance conditions. *All applicable compliance conditions listed must be met for the Notice of Intent to be considered complete.*

  * * * *

  Provide the name(s) of the receiving water(s) to the first uniquely named river. Explain to where the storm water runoff will drain (e.g., unnamed waterway to road ditch to unnamed tributary to Mud Creek to Skunk River).[8]

The administrative burden of complying with general permits is illustrated by looking to general permits for aquatic pesticide use in the State of Washington, which began issuing such permits in 2002. *See* Pet. App. 4a. Washington has three general permits for pesticides involving aquatic plants and one for mosquito control. *See* Washington State Governor's Office of Regulatory Assistance, Environmental Permit Handbook, NPDES Aquatic Pesticides General Permit, *available at* http://apps.ecy.wa.gov/permithandbook/permitdetail.asp?id=99 (last visited Dec. 3, 2009). Applicators seeking to control aquatic plants must first determine which of three permit programs applies and then submit an application. The permits range in length from 22 to 71 pages with

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http://www.azdeq.gov/environ/water/permits/download/ms4small.pdf.

[8] Iowa Dep't of Natural Res., How to File a Complete Notice of Intent for NPDES General Permit at 2 (2007), *available at* http://www.iowadnr.gov/water/stormwater/forms/how_noi.pdf (emphasis added).

appendices. Even the permit most likely to apply to farmers (the irrigation system aquatic weed control permit, *see* Irrigation System Aquatic Weed Control National Pollutant Discharge Elimination System and State Waste Discharge General Permit (Feb. 20, 2008), *available at* http://www.ecy.wa.gov/programs/wq/pesticides/irrigation/permit-irrig_district-final.pdf) entails a significant administrative burden, imposing detailed monitoring requirements, *see id.* at 8-11, public notice requirements, *id.* at 12-13, and recordkeeping requirements, *id.* at 13-15, and requires submission of both an "Integrated Vegetation Management Plan" and a "spill control plan." *Id.* at 11.

3. In addition, even a general permit scheme presents a substantial risk of litigation and ruinous fines. Efforts at full compliance with the planned general permit scheme are bound to fall short in some respects "[g]iven that most applicators will not have ever been subject to an NPDES permit." Pet. App. 159a (decl. of James A. Hanlon, Dir., Office of Wastewater Management, Office of Water, EPA (Apr. 8, 2009)). Applicators face fines of up to $37,500 *per day per violation*, plus attorney's fees. *See* 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4 (2008); 33 U.S.C. § 1365(d). While the EPA may refrain from prosecuting the enormous class of newly minted NPDES permittees, there is every reason to believe that permittees' efforts at compliance will be subject to exacting scrutiny and perceived shortcomings will promptly become the subject of citizen suits. As the EPA noted below, in just weeks after the Sixth Circuit's decision, dozens of notices of intent to sue were filed involving mosquito spraying programs alone. Pet. App. 188a-189a. Those are likely the harbinger of many more lawsuits. Unless this Court acts, hundreds of thou-

sands of small applicators and "farmers will go into the next growing season under the threat of lawsuits." Nat'l Ass'n of State Dep'ts of Agric., NPDES Permits for Pesticide Applications Near Water (Sept. 28, 2009), *available at* http://www.nasda.org/File.aspx?id=24468.

4. The Sixth Circuit decision could have grave implications for public health. While not as time-consuming as individual permit systems, even a general permit scheme can result in significant delays, increased costs of compliance can divert resources from pest control, and litigation risks can deter and delay pest-control efforts. The combination could seriously undermine pest-control efforts that are critical to public health, particularly the control of mosquitoes. "[M]osquito-borne illnesses continue to pose significant risks to parts of the population in the United States." EPA & U.S. Centers for Disease Control & Prevention, Joint Statement on Mosquito Control in the U.S. (Apr. 10, 2007), *available at* http://www.epa.gov/pesticides/health/mosquitoes/mosquitojoint.htm. "Disease carrying mosquito species are found throughout the U.S.," *id.*, spreading West Nile virus, encephalitis, Dengue fever, and other serious diseases. Because pesticide use is an essential part of mosquito control efforts, if delays, increased expense, and litigation significantly curtail mosquito control efforts, the consequences could be deadly.

The Sixth Circuit's decision likewise could have serious effects on agriculture. The delays inherent in general permit schemes make them ill suited for many pest-control efforts, which require rapid responses to changing conditions.

> [P]est problems can develop quickly and require a prompt response. Failure to apply a pesticide

> soon after a pest is first detected could result in recurring and greater pest damage in subsequent years if a prolific insect were to become established in * * * plant hosts. Fungal spores such as soybean rust can move hundreds of miles in a few days' time via the wind * * *.

Pet. App. 167a (decl. of Teung F. Chin, Acting Director, Agricultural Research Service, Office of Pest Management Policy, U.S. Dep't of Agric. (Apr. 7, 2009)). Many family farmers and other small applicators lack the resources necessary to comply with a detailed permit scheme. Delays thus could cripple American farmers' emergency pest control efforts and impede their ability to respond quickly to new infestations. *Cf.* Pet. App. 164a-165a; *id.* at 203a (discussing individual permits). As Secretary of Agriculture Thomas J. Vilsack observed earlier this year, "a permitting system * * * is ill-suited to the demands of agricultural production." *Id.* at 203a.

5. Finally, the Sixth Circuit's deeply flawed decision may result in even more widespread liability because of its understanding of what constitutes the discharge of a pollutant *from* a point source. The Sixth Circuit concluded that excess pesticide and residue is waste from a "point source" although it was a useful product at the time it left the nozzle and only became waste later. Pet. App. 27a. The Sixth Circuit thereby concluded that something that would not ordinarily be deemed "waste" at the time and location of its release would nonetheless require a NPDES permit if it becomes "waste" at some point in the indeterminate future. That conclusion could have wide-ranging ramifications, and could lead to citizen suits seeking to require NPDES permits for tailpipe and smokestack emissions that may eventually enter

a water body as air deposition (although they are already subject to regulation under the Clean Air Act), for the dispensing of road salt, for the application of domestic fertilizers, and for the use of many other everyday products that have never before been subject to NPDES permitting. The Sixth Circuit's conclusion was a necessary step in its reasoning to support the judgment, and it is likely that litigants will use it in seeking to expand the scope of NPDES permitting into areas and activities not intended by Congress.

C. Review Is Warranted Now Regardless Of Whether EPA Plans To Maintain The Rule

Powerful institutional considerations favor review by this Court, regardless of whether the new Administration wishes to maintain the Rule. Given the tremendous practical importance of the Rule, review of the Sixth Circuit's deeply flawed decision is certainly warranted if the EPA wishes to retain it. But even if EPA may wish to depart from its longstanding practice, review is warranted so the agency can revisit its decision through traditional administrative procedures, without reliance on a transparently flawed circuit-court opinion. *See generally Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). The Sixth Circuit's holding that the terms "chemical waste" and "biological waste" are unambiguous has significantly curtailed the EPA's regulatory discretion with respect to an extraordinarily broad range of products. *See* Pet. App. 121a. Unless the Sixth Circuit's unreasonable construction of the CWA is vacated, its holding that those terms are "unambiguous" will have a distorting influence on any future rulemaking the EPA may wish to conduct in this area. *See, e.g., Nat'l Cable & Telecomms.*

Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) ("[a] court's prior judicial construction of a statute trumps an agency construction * * * if [it] holds that its construction follows from the unambiguous terms of the statute").

Even if the EPA favored the adoption of a general permit scheme for aquatic pesticides as a policy matter, such a significant change should be made through rulemaking, rather than the shortcut of relying on the Sixth Circuit's flawed decision. An agency is "require[d]" to "provide reasoned explanation for its action," *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009), and notice and comment rulemaking ensures "a measure of public accountability in[] administrative practices." *Exportal Ltda. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990). It would ill serve interests in regulatory accountability to permit EPA regulations to be effectively amended without notice and comment by acquiescence in the Sixth Circuit's unreasonable construction of the statute. *Cf. Fox Television Stations*, 129 S. Ct. at 1811 ("An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."); *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 995 (D.C. Cir. 2005) (an agency cannot "'evade notice and comment requirements by amending a rule under the guise of reinterpreting it'") (quoting *Molycorp, Inc. v. EPA*, 197 F.3d 543, 546 (D.C. Cir. 1999)).

Finally, there is no warrant for denying certiorari to permit further development of the law in the courts of appeals. As noted above and in the petitions, Pet. 16-21, *CropLife America v. Baykeeper*, No. 09-533; Pet. 35-36, *American Farm Bureau Federation v. Baykeeper*, No. 09-547, the Sixth Circuit's de-

cision conflicts with decisions of this Court and other courts of appeals. Moreover, because challenges to the EPA's rule from eleven circuits were consolidated in the Sixth Circuit, *see* Pet. App. 8a, the decision below constitutes the sole judicial review that the EPA Rule will receive. As this Court has noted in the analogous context of courts of exclusive jurisdiction, under such circumstances, "the rule that [the court of appeals] applied in this case * * * is a matter of special importance to the entire Nation" warranting immediate review. *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 89 (1993).

CONCLUSION

For the reasons stated above, the petitions for a writ of certiorari should be granted. Alternatively, this Court should grant, vacate, and remand for further consideration in light of the intervening decision in *Burlington Northern*.

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CROPLIFE AMERICA, *et al.*,
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v.

BAYKEEPER, *et al.*
Respondents.

AMERICAN FARM BUREAU FEDERATION, *et al.*,
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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF VALENT BIOSCIENCES CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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USDA, Forest Service, *Control/Eradication Agents for the Gypsy Moth Human Health and Ecological Risk Assessment for Bacillus thuringiensis var. kurstaki (B.t.k.), available at* http://www.fs.fed.us/foresthealth/pesticide/pdfs/060804_btk.pdf. 10

USDA Forest Service, *Northeastern Area, Gypsy Moth Digest—Defoliation, available at* http://na.fs.fed.us/fhp/gm/defoliation/index.shtm. 9

World Health Organization, *Bacillus Thuringiensis, Summary, available at* http://apps.who.int/bookorders/anglais/detart1.jsp?sesslan=1&codlan=1&codcol=16&codcch=217 1

INTEREST OF *AMICUS CURIAE* [1]

Valent BioSciences Corporation ("VBC") manufactures a unique class of FIFRA-registered pesticides known as "biological pesticides," which consist of naturally occurring microorganisms. They are applied to water to control mosquito larvae before they grow into adults capable of transmitting disease; to the canopy of forests to control caterpillars that defoliate and destroy trees; and also to agricultural crops.

Biological pesticides are environmentally beneficial and play an important role in integrated pest and mosquito management programs. Their application to or near water, including the application of a subspecies of the naturally occurring soil bacterium *Bacillus thuringiensis* ("*Bt*"), does not produce biological wastes. Nor do biological pesticides alter the chemical, physical or biological integrity of the waters of the United States. The World Health Organization has concluded that "*Bt* products are unlikely to pose any hazard to humans or other vertebrates or to the great majority of non-target invertebrates. . . ."[2]

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[1] VBC states under Supreme Court Rule 37.6 that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than VBC and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Under Supreme Court Rule 37.2, on November 19 and 20, 2009, VBC provided counsel of record listed then on the Court docket with notice of its intention to file this brief. All of those parties have consented to the filing of the brief; their letters of consent are lodged with the Clerk.

[2] World Health Organization, *Bacillus Thuringiensis*, *Summary*, *available at* http://apps.who.int/bookorders/anglais/detart1.jsp?sesslan=1&codlan=1&codcol=16&codcch=217.

VBC devotes a substantial portion of its resources to the research and development, FIFRA registration, and commercialization of biological pesticides, including *Bt* larvicides. The industry that discovers and commercializes biological pesticides is comprised of many small or medium size businesses, such as VBC.

VBC respectfully submits that the Sixth Circuit's conclusion that a biological pesticide is always a Clean Water Act ("CWA") "pollutant" is wrong. *See* 33 U.S.C. § 1362(6). If allowed to stand, the lower court's decision will discourage, and in most cases prevent, the timely and effective use of biological pesticides, and also needlessly subject users of biological pesticides to CWA citizen suits. Losing the timely use of biological pesticides would be especially unfortunate because the CWA's goal is "to restore and maintain the chemical, physical and biological integrity" of waters, 33 U.S.C. § 1251(a), not to regulate as CWA pollutants environmentally beneficial biological pesticides, which help to protect public health and the natural environment.

VBC, which also submitted an *amicus curiae* brief below, is filing this brief in support of both certiorari petitions in order to urge the Court to review and correct the Sixth Circuit's decision, including specifically with respect to biological pesticides.

REASONS FOR GRANTING THE PETITIONS

Review should be granted in order to correct the lower court's erroneous holding that biological pesticides are CWA "pollutants." They are instead a unique and invaluable class of EPA-approved pesticides, comprised of naturally occurring microorganisms, including the soil bacterium *Bacillus thuringiensis* ("*Bt*"). *Bt* biological pesticides, also called *Bt* larvicides because they control insect larvae, are applied to water to control the larval form of the mosquito, an insect that causes more death and disease than any non-human animal. They also are applied to forests to control caterpillars that annually destroy millions of acres of trees. *Bt* larvicides not only are highly effective in controlling mosquito larvae and caterpillars, but also *benefit* the aquatic environment because they do not affect nontarget aquatic organisms. *Bt* biological pesticides provide significant net environmental, economic and public health benefits.

The CWA's illustrative "pollutant" example—"biological materials"—means biological *wastes*, not any and all material of a biological nature, such as *Bt* larvicides. And because they do not alter the integrity of the waters to which they are applied, *Bt* larvicides do not meet the CWA's definition of "pollution." Unless reversed, the Sixth Circuit's decision requiring compliance with time-consuming NPDES permit requirements will delay or prevent the timely and effective application of *Bt* biological pesticides to control disease-carrying mosquitoes and other target pests.

I. THIS CASE IS EXCEPTIONALLY IMPORTANT TO PUBLIC HEALTH AND THE PROTECTION OF FORESTS BECAUSE UNLESS THE SIXTH CIRCUIT'S DECISION IS REVERSED, THE AVAILABILITY AND EFFECTIVE USE OF STATE-OF-THE-ART, NATURALLY OCCURRING BIOLOGICAL PESTICIDES WILL BE SERIOUSLY CURTAILED, IF NOT COMPLETELY LOST

Bt biological pesticides benefit the environment while controlling insects. *Bt* larvicides are inherently less toxic to man and the environment than conventional chemical pesticides. In contrast with most conventional chemical pesticides, which may affect a large spectrum of organisms, including adversely affecting non-target organisms, *Bt* larvicides affect only the biology of the larva of a particular insect pest, and they decompose quickly in the water. Indeed, EPA has stated that "[e]xtensive testing shows that microbial [*i.e.*, biological] larvicides do not pose risks to wildlife, nontarget species, *or the environment*, when used according to label directions."[3] For these reasons, *Bt* biological pesticides provide significant net environmental, economic and social benefits. They protect public health. They also reduce forest defoliation and thereby maintain the capacity of forests to capture carbon and offset greenhouse gas emissions and control insects that jeopardize wildlife.

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[3] EPA, *Larvicides for Mosquito Control, available at* http://www.epa.gov/opp00001/health/mosquitoes/larvicides4mosquitoes.htm (hereinafter "EPA, *Larvicides for Mosquito Control*") (emphasis added).

The National Research Council, whose members are drawn from the Councils of the National Academy of Sciences, reported in 2000 that while conventional pesticides will continue to play an important role in pest control technology, there remains the need for pest controls that are consistent with ecologically-based pest management.[4] Biological pesticides are consistent with ecologically-based pest management. The Sixth Circuit's holding that biological pesticides are CWA "pollutants" will discourage their continued development and use. By subjecting these highly beneficial and time-sensitive products (which EPA has repeatedly determined are safer for the environment than conventional pesticides) to a lengthy permitting process, the Sixth Circuit decision will sharply curtail and reverse efforts to control harmful and life-threatening diseases and the adverse effects associated with deforestation.

A. The Sixth Circuit's Decision Vacating EPA's Final Rule and Requiring NPDES Permits for Biological Pesticides Will Frustrate If Not Altogether Prevent Their Timely and Effective Use

To initiate the process of complying with the lower court's decision, EPA, on October 7, 2009, released for comment draft conditions for applying pesticides under an National Pollutant Discharge Elimination System ("NPDES") pesticide general permit ("PGP").[5]

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[4] National Research Council, Committee on the Future Role of Pesticides in US Agriculture, *The Future Role of Pesticides in US Agriculture* (2000) at 251-52, *available at* http://books.nap.edu/openbook.php?record_id=9598&page=R1.

[5] EPA, *Clean Water Act Permitting of Discharges from Pesticide Applications* (Webinar) (Oct. 7, 2009), *available at* http://

In particular, under the draft conditions, applicators of all pesticides to or near water must hold, as of April 10, 2011, an individual NPDES permit or comply with the conditions of a PGP. The PGP will impose a myriad of conditions and restrictions on pesticide applicators, including the requirement to file a Notice of Intent ("NOI") before applying pesticides, technology and water quality-based effluent limits, and monitoring and reporting requirements. Governmental and private entities charged with controlling nuisance and disease-carrying mosquitoes face severe budgetary constraints in the current economy. They can ill afford the additional costs of complying with the conditions of PGP, especially when, in the case of biological pesticides, compliance will not bring any additional benefits to man or the environment.

The use of larvicides for mosquito control is widespread: they are applied to treat four million acres of water annually.[6] The application of *Bt* for larval control also is extremely time-sensitive. For mosquito control, *Bt* biological pesticides must be applied while the larvae are in their feeding stage and before they enter the pupae phase, a narrow and time critical window of several days. Moreover, mosquito larvae populations can increase as a result of unexpected rains and high tides.

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www.epa.gov/pesticides/ppdc/2009/october/session-1.pdf (hereinafter "EPA, *CWA Permitting of Discharges from Pesticide Applications*").

[6] EPA, NPDES Application Estimates and Information Sources (draft) (Sept. 23, 2009) *available at* http://www.epa.gov/pesticides/ppdc/2009/october/session1-npdes.pdf. (hereinafter "EPA NPDES Application Estimates").

The Sixth Circuit's decision will prevent the timely and effective application of *Bt* biological pesticides. EPA has stated that "[a] person filing an NOI would be covered starting 10 days *after* receipt of a complete and accurate NOI form by the appropriate permitting authority (provided the permitting authority does not delay authorization to further assess the NOI)."[7] Requiring applicators to wait ten days before using the *Bt* larvicides likely will force them to miss the critical larvae feeding stage. While pesticides may be applied in emergency situations before the submission of a NOI, the purpose of mosquito larviciding is to avoid an emergency. Because the Sixth Circuit decision will, as a practical matter, prevent the timely use of *Bt* larvicides, the decision will have a significant adverse impact on the use of these beneficial pest control products.

B. *Bt* Larvicides Are Critical for Effective Mosquito Control

The mosquito is a very efficient carrier of disease. It causes more human suffering and death than any non-human animal.[8] The mosquito transmits more than 100 pathogens that cause protozoan diseases such as malaria, filarial diseases such as heartworm, and viral diseases such as yellow fever, dengue fever, encephalitis, and West Nile virus. Each year there are 300 to 500 million cases of malaria reported worldwide, resulting in at least one million deaths

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[7] EPA, *CWA Permitting of Discharges from Pesticide Applications* (slide 45) (emphasis added).

[8] American Mosquito Control Association, *Mosquito-Borne Diseases, available at* http://www.mosquito.org/mosquito-information/mosquito-borne.aspx.

every year.[9] CDC already has reported 608 cases of mosquito-transmitted West Nile Virus, and 28 deaths, in 2009.[10]

All mosquitoes begin life in stagnant or standing water and develop through four stages of metamorphous: egg, larva, pupa, and adult. The female's eggs hatch within a day or two, releasing larvae that only live in water from four to fourteen days, after which they change to pupae before becoming adult mosquitoes that take flight. Public and private mosquito control programs practice Integrated Mosquito Management, which seeks to control mosquitoes by reducing aquatic breeding sites for the larvae. When monitoring and surveillance programs confirm the need to control mosquito larvae with pesticides, the FIFRA-registered choices include biological pesticides such as *Bt* larvicides, biochemical pesticides such as methoprene (an insect growth regulator), and conventional organophosphate chemical insecticides.[11] Unlike the more limited and precise application of larvicides, the control of adult mosquitoes requires the ground and aerial spraying of conventional organophosphate chemical pesticides over much larger areas.[12]

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[9] Centers for Disease Control and Prevention, *The Impact of Malaria, A Leading Cause of Death Worldwide, available at* http://www.cdc.gov/malaria/index.htm.

[10] Centers for Disease Control and Prevention, *West Nile Virus, Statistics, Surveillance, and Control, available at* http://www.cdc.gov/ncidod/dvbid/westnile/surv&controlCaseCount09_detailed.htm#MeningitisEnc.

[11] American Mosquito Control Association, *Control, available at* http://www.mosquito.org/mosquito-information/control.aspx.

[12] EPA, *Larvicides for Mosquito Control* ("Killing mosquito larvae before they emerge as adults can reduce or eliminate the

The most widely used biological pesticide applied to water to control mosquito larvae are two subspecies of *Bt*: *Bacillus thuringiensis israelensis* ("*Bti*") and *Bacillus sphaericus* ("*B. sphaericus*"). Mosquito larvae consume the dormant *Bt* bacterium spores and an associated *Bt* toxin that binds to receptor cells in the mosquito larva's gut, thereby causing the larva to starve. These receptor cells are not present in fish or mammals. *Bti* and *B. sphaericus* therefore benefit the environment because they control only the mosquito larvae and do not affect other nontarget aquatic organisms.[13] *Bt* biological pesticides serve as an important tool in managing the mosquito's development of resistance to traditional chemical larvicides and adulticides.[14]

C. *Bt* Larvicides Also Are Important for Protecting Forests

EPA's Final Rule, 71 Fed. Reg. 68,483 (Nov. 27, 2006), cited, as an example of pesticides that are applied "near" water, insecticides that are applied aerially to the forest canopy to control foliage-feeding caterpillars where waters of the United States may be present below the canopy. Pet. App. 7a. In 2008, the Gypsy Moth alone defoliated 1,593,649 acres of trees in the northeastern United States.[15] There are

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need for ground or aerial application of pesticides to kill adult mosquitoes.").

[13] *Id.*

[14] North Carolina State University, *Pesticide Resistance Management, available at* http://ipm.ncsu.edu/apple/orchardguide/Resistance.pdf.

[15] USDA, Forest Service, *Northeastern Area, Gypsy Moth Digest—Defoliation, available at* http://na.fs.fed.us/fhp/gm/defoliation/index.shtm.

2.7 million acres of forests that are treated every year to control caterpillars.[16] The Sixth Circuit's decision will also preclude the timely and effective use of these biological pesticides to control caterpillars that kill trees. Preserving forests through the application of biological pesticides contributes to clean water because forests serve to filter pollutants.[17]

Commercial formulations of *Bacillus thuringiensis* subspecies ***kurstaki*** (***"Btk"***) have been used to control forest caterpillar pests since the mid-1970's. More than a million pounds of ***Btk*** are applied annually in the United States to control the destructive gypsy moth. A total of 2,743,816 acres were treated with ***Btk*** formulations between 1995 and 2002.[18] As with other subspecies of ***Bt***, ***Btk*** is considered "friendly" to humans and the environment. It controls only susceptible caterpillars by the mechanism described above. "U.S. EPA (1998) classifies ***Btk*** as virtually non-toxic to fish, based on an assessment of several acute toxicity studies in trout and one study in bluegills."[19]

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[16] EPA NPDES Application Estimates.

[17] CNN, *Study: Saving Forests Best Way To Cheap, Clean Water, available at* http://www.cnn.com/2003/TECH/science/09/03/forests.water.reut/index.html.

[18] USDA, Forest Service, *Control/Eradication Agents for the Gypsy Moth Human Health and Ecological Risk Assessment for Bacillus thuringiensis var. kurstaki (B.t.k.), available at* http://www.fs.fed.us/foresthealth/pesticide/pdfs/060804_btk.pdf.

[19] *Id.* at 4-8.

D. EPA Has Recognized That Biological Pesticides Pose Lower Risks Than Most Conventional Pesticides

EPA is responsible for registration of the following categories of pesticides under FIFRA: conventional (chemical) pesticides, biological pesticides (or microbials or biopesticides), biochemical pesticides, plant-incorporated protectants (plants that genetically produce their own pesticides), and antimicrobial pesticides (*e.g.*, disinfectants). *See* 72 Fed. Reg. 60,988, 60,989 (Oct. 26, 2007). The Agency has stated that "[t]hese pesticides, although regulated under the same statutory standards under FIFRA and FFDCA, pose different levels of risk and exposure. . . ." *Id.*

Because they consist of naturally occurring microorganisms, EPA has stated that "[b]iopesticides are usually inherently less toxic than conventional pesticides."[20] The Agency requires all pesticide applicants to submit toxicology and environmental studies, which the Agency reviews to determine whether a pesticide meets FIFRA's "no unreasonable adverse effects on the environment" standard for registration. *See* 7 U.S.C. § 136a(c)(5)(D). But because biological pesticides are inherently less toxic than conventional pesticides, EPA requires applicants for biological pesticide registrations to submit much less data than applicants seeking to register conventional pesticides. *Compare* 40 C.F.R. §§ 158.1—158.1410 (data requirements for conventional pesticides) *with* 40 C.F.R. §§ 158.2100—158.2174 (data requirements for microbial pesticides).

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[20] EPA, *What Are Biopesticides?*, *available at* http://www.epa.gov/pesticides/biopesticides/whatarebiopesticides.htm. (hereinafter "EPA, *What are Biopesticides?*").

In 1995, EPA created the Biopesticides and Pollution Prevention Division to bring "safer pesticides products into the market place and to encourage the adoption of these safer, reduced risk products and related integrated pest management (IPM) practices."[21] EPA Guidelines for expedited review of conventional and biological pesticides explain that "EPA believes that biological pesticides generally pose less risk than most conventional pesticides."[22]

The Sixth Circuit's decision would require all users of these beneficial and efficacious biological pesticides to submit to the time-consuming NPDES permitting process, which will hamper, if not largely prevent, the use of these products to control disease and deforestation.

II. THE SIXTH CIRCUIT'S DECISION IS PREMISED IN PART ON FUNDAMENTAL ERRORS REGARDING BIOLOGICAL PESTICIDES

A. Biopesticides Are Not "Biological Material" Pollutants Under the Clean Water Act

Biological pesticides are not CWA pollutants because they are not biological *wastes*. The Sixth Circuit's decision that biological pesticides, which benefit public health and the environment, are CWA pollutants because they may superficially "fit into the ordinary meaning of 'biological materials,'" Pet. App.

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[21] Russell S. Jones, *The Biochemical Classification Committee and the Classification of Biochemical Active Ingredients, available at* http://www.pharmsolutions.com/docs/ClassificationBioChemicalActiveIngredients.htm.

[22] EPA, Pesticide Registration Notice 97-3 at XI(B), *available at* http://epa.gov/PR_Notices/pr97-3.html.

19a, is wrong. That conclusion produces absurd results and is at odds with basic principles of statutory construction and established case law holding that "biological materials" means biological *wastes*.

The Sixth Circuit cited no legislative history remotely suggesting that when Congress passed the CWA in 1972, it intended that any and all "matter of a biological nature" introduced into the waters of the United States would constitute the prohibited discharge of a pollutant. Pet. App. 21a. If that were true, then Congress intended that the state game warden who stocks the local trout stream in the Spring with "artificial concentrations" of young trout, or the fisherman who casts upon the waters the sacrificial worm, must first obtain a NPDES permit. Under the Sixth Circuit's decision, both the trout and the worm would squarely qualify as "biological materials" within the "ordinary, contemporary, [and] common meaning" of the term, thus requiring an NPDES permit. *See id.* at 20a-21a, citing *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Attorney*, 369 F.3d 960, 967 (6th Cir. 2004).

"Biological materials" as used in the CWA definition of "pollutants," however, means biological *wastes*. *Bt* larvicides are not biological wastes. They are applied to or near waters of the United States to protect the environment, public health and natural forestry resources. After serving their intended beneficial purpose they do *not* leave a residue or waste in the waters because they consist of naturally occurring bacteria.[23]

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[23] EPA Pesticides Glossary, *available at* http://www.epa.gov/pesticides/glossary/#b (hereinafter "EPA Pesticides Glossary").

The "precise question at issue" is whether, when Congress enacted the CWA in 1972, it clearly intended that a "biological pesticide" applied to water to control a pest was a prohibited "pollutant." *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 837-38 (1984). The Sixth Circuit committed clear error when, instead of ascertaining "whether Congress has directly spoken to the precise question at issue," it quoted two dictionary definitions of "material" and summarily declared that the "plain, unambiguous nature of" biological materials compels the conclusion that biological pesticides are CWA pollutants. Pet. App 20a-21a. *Chevron* requires more.

A court must assess the clarity or lack of clarity of statutory language by employing all of the traditional tools of statutory construction. *Chevron*, 467 U.S. at 843, n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."). Thus, the clarity or ambiguity of the statutory term "biological materials" must not be assessed in a vacuum, or merely by reference to general dictionary definitions, but instead must be assessed within the context of whether Congress intended "biological materials" to encompass beneficial biological pesticides. *See generally Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) ("[T]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. . . . It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000)) (internal

quotation marks omitted); *Zuni Pub. School Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 98 (2007) (statutory "[a]mbiguity is a creature not [just] of definitional possibilities but [also] of statutory context.") (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994)).

The context of the CWA demonstrates that Congress did not intend "biological materials" to include biological pesticides. EPA did not register the first *aquatic Bt* biological larvicide, *Bti*, for the control of mosquito larvae until 1983. It did not register the second *Bt* mosquito larvicide, *B. sphaericus*, until 1991.[24] As EPA's Final Rule noted, "[t]he fact that more biological pesticides have been developed since passage of the [Clean Water] Act in 1972 does not justify expanding the reach of the NPDES permit requirement when there is no evidence that Congress intended the CWA to regulate biological pesticides in a manner different from chemical pesticides." Final Rule, 71 Fed. Reg. at 68,486. Because Congress could not have directly addressed whether "biological materials" includes "biological pesticides," the Sixth Circuit should have afforded *Chevron* deference to EPA's Final Rule, which concluded that "it would not make sense, and would be inconsistent with the goals of the Clean Water Act, to discourage the use of biological pesticides by requiring applicators of these products to obtain an NPDES permit when chemical pesticides have no such requirement." *Id.* at 68,486-87.

Ironically, to bolster its conclusion that "biological materials" includes biological pesticides, the Sixth Circuit looked at an EPA definition of the term "biological pesticides." Pet. App. 22a-23a. The Sixth

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[24] EPA, *Larvicides for Mosquito Control*.

Circuit, however, materially misstated EPA's definition. According to the Sixth Circuit, EPA defines "biological pesticides" to include "other biological materials." *Id.* In fact, the EPA definition of "biological pesticides" does *not* include "other biological materials," but only "certain microorganisms, including bacteria, fungi, viruses, and protozoa that are effective in controlling target pests."[25]

The Sixth Circuit also erred when it assumed that biological pesticides are wastes. *Bt* biological pesticides are not wastes: they leave no residue in the water after serving their intended purpose of controlling mosquito larva.[26] Courts treat "biological materials" as pollutants only if they are biological wastes.

In each of the "biological materials" cases cited by the Sixth Circuit, the court specifically found that human activity generated a biological waste. For example, in *Association to Protect Hammersley, Eld, & Totten Inlets v. Taylor Resources, Inc.*, 299 F.3d 1007, 1016 (9th Cir. 2002), the Ninth Circuit found the CWA to be "ambiguous on whether 'biological materials' means *all* biological matter regardless of quantum and nature." The court held that mussel shells, mussel feces, and other biological materials emitted from mussel-harvesting facilities were not "biological materials" because "the shells and natural byproduct of living mussels released . . . are the result of the natural biological processes of the mussels, *not the waste product of* a transforming human process." *Id.* at 1017 (emphasis added). Applying the doctrine of *ejusdem generis*, the court found that the "more specific items in the illustrative

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[25] EPA Pesticides Glossary.

[26] *Id.*

list of pollutants . . . support an understanding of the more general statutory term, 'biological materials,' as *waste* material of a human or industrial process." *Id.* at 1016 (emphasis added).

In the second case cited by the Sixth Circuit, *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988), the court found that fish *remains* discharged from a hydroelectric facility are pollutants since they are "biological materials." That the biological materials—dead fish and fish parts—remain in the water after the human activity attests to their characterization as "biological materials" *wastes*. In the third case, relied upon but not analyzed by the Sixth Circuit, *United States Public Interest Research Group v. Atlantic Salmon of Maine*, 215 F. Supp. 2d 239 (D. Me. 2002), the district court went no further than to hold that non-North American salmon that escape from an aquaculture facility are "biological materials" because the fish do not occur naturally in that water and that salmon feces and urine that escape the facility's nets are either "biological materials" or "agricultural wastes." *Id.* at 247-49. Animal feces and urine are biological materials, but more importantly they are wastes—the useless byproducts of metabolism.

Other courts have confirmed that biological materials means biological wastes. *See, e.g., Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 117 (2d Cir. 1994) (liquid manure spread on farm fields met definition of pollutant as it was "solid waste, . . . sewage, . . . biological materials, . . . and agricultural waste discharged into water"); *United States v. Plaza Health Laboratories, Inc.*, 3 F.3d 643, 645 (2d Cir. 1993), *cert. denied*, 512 U.S. 1245 (1994) (discarded vials of human blood are "biological mate-

rials"); *United States v. Frezzo Bros.*, 461 F. Supp. 266, 269-70 (E.D. Pa. 1978), *aff'd*, 602 F.2d 1123 (3d Cir. 1979) (runoff from pile of "mushroom compost" was discharge of "sewage" and "biological materials").

EPA's Final Rule relied upon and cited most of these cases for the Agency's well supported conclusion that "[i]n cases in which courts have found specific biological materials to be 'pollutants' under section 502(6) the substances at issue were waste materials discharged from a point source." 71 Fed. Reg. at 68,487. The Sixth Circuit found a conventional pesticide to be a "chemical waste" only if it leaves an excess portion in the water "after performing its intended purpose." Pet. App. 18a. For this reason, a *Bt* bacterium is a biological waste only when it too leaves an excess portion in the water after performing its intended purpose. But because they are naturally occurring, *Bt* bacterium do not leave an excess portion in the water after performing their intended purpose. Therefore, *Bt* larvicides are not pollutants under the Clean Water Act.

B. Biopesticides Do Not "Undeniably Alter the Physical Integrity of the Waters"

After mistakenly concluding that biological pesticides are CWA "pollutants" because they fit within the ordinary meaning of "biological materials," the Sixth Circuit then mistakenly concluded that a biological pesticide must meet the CWA's definition of "pollution," 33 U.S.C. § 1362(19), because, when added to water, they "undeniably alter its biological integrity." Pet. App. 23a. There is no evidence even remotely suggesting, however, that the addition of naturally occurring *Bt* biological pesticides alters the biological integrity of the waters of the United States.

Instead, EPA has concluded that biological pesticides do not alter the water integrity. The Agency defines "biological integrity" of water as "the capability of supporting and maintaining a balanced, integrated, adaptive community of organisms having a species composition, diversity, and functional organization comparable to that of the natural habitat of the region."[27] The application of *Bti* and *B. sphaericus* to aquatic environments to control mosquito larvae, as well as the application of *Btk* near water to control caterpillars that defoliate trees, meet EPA's criteria for preserving the water's biological integrity. Because they are naturally occurring, they degrade quickly.[28] EPA has expressly stated that "[e]xtensive testing shows that microbial larvicides *do not pose risks to wildlife, nontarget species, or the environment*, when used according to label directions."[29] Similarly, EPA has classified *Btk* as nontoxic to fish and aquatic invertebrate. Because EPA has determined that biological pesticides do not pose risks to nontarget aquatic species, the Sixth Circuit erred when it concluded that it is "undeniable" that biological pesticides alter the biological integrity of waters of the United States.

The Sixth Circuit incorrectly concluded that the CWA's definitions of "pollutant" and "pollution" are unambiguous and include biological pesticides. In so doing, the court unnecessarily subjected users of beneficial biological pesticides to a costly and time-

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[27] EPA, *Biological Integrity*, *available at* http://www.epa.gov/bioiweb1/html/biointeg.html.

[28] EPA, *What are Biopesticides?* ("Biopesticides . . . often decompose quickly . . .").

[29] EPA, *Larvicides for Mosquito Control*. (Emphasis added.)

consuming NPDES permitting process that will hinder the timely use of these products for important public health and environmental uses.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted,

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